TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 196.

W. O. ROGERS, Jr., ELLEN G. M. ROGERS, JOHN B. MARTIN, ET AL., PLAINTIFFS IN ERROR,

vs.

JOSEPH T. JONES, THE COUNTY OF HARRISON, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED OCTOBER 2, 1907.

(20,893.)

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a Supreme Court of Mississippi, October Term, A. D. 1906.

MONDAY, *October 8th*, 1906.

Caption.

Supreme Court.

Pleas and proceedings had and done at a regular term of the Supreme Court of Mississippi, at the court room, in the capitol, in the City of Jackson, Miss., on the second Monday of October, A. D. 1906.

Present and presiding: Honorable Albert H. Whitfield, Chief Justice, Honorable S. S. Calhoun, and Honorable Robert B. Mayes associate Justices, Geo. C. Myers, Clerk of said Court, and C. L. Johnson, Marshal.

1 *Caption.*

Chancery Court.

THE STATE OF MISSISSIPPI,
Harrison County:

Be it remembered that a regular term of the Chancery Court for the County of Harrison in the State of Mississippi, was begun and held at the Court-House of said County, in the Town of Gulfport, in said County and State, on the first Monday in February, A. D., 1904, being the 1st day of February, A. D., 1904, the same being the time and place designated by law for holding said Court.

Were present and in attendance on said Court, the Honorable Stone Deavours, Chancellor of the 2nd Chancery Court District, of the State of Mississippi, herein solely presiding, Florian Seal, Sheriff of said Harrison County, and F. S. Hewes, Clerk of said Court.

2 *Bill of Complaint.*

In Chancery Court, to February Term, 1904.

STATE OF MISSISSIPPI.
County of Harrison:

WILLIAM O. ROGERS, JR., a Resident Citizen of the City of New York, County of New York, and State of New York; ELLEN G. M. ROGERS, a Resident Citizen of the City of Madison, County of Morris, and State of New Jersey; JOHN B. MARTIN, a Resident Citizen of the County of Yazoo and State of Mississippi; Mrs. ROSA ADELE MATTHEWS, Wife of George B. Matthews, of the City of New Orleans, Parish of Orleans, State of Louisiana, and Mrs. L. N. BRUNSWIG, Wife of L. N. Brunswig, a Resident of the City of New Orleans, Parish of Orleans, and State of Louisiana, Complainants,

vs.

JOSEPH T. JONES, a Resident Citizen of the Town of Gulfport, County of Harrison, State of Mississippi, and THE COUNTY OF HARRISON, a quasi Corporation of the State of Mississippi, and A. J. BOND, U. DESPORTE, JOHN SCARBOROUGH, W. E. WHITTINGTON, and J. B. CLARKE, Individuals and Members Constituting the Board of Supervisors of the County of Harrison, in the State of Mississippi, all Resident Citizens of Harrison County, State of Mississippi, Defendants.

To the Honorable Chancery Court of Harrison County, Mississippi:

3 Your orators respectfully represent unto your Honor that they are the lineal descendants and sole surviving heirs-at-law of John Martin, deceased, who died intestate in the city of New Orleans, State of Louisiana, in the year A. D., 1848.

That the said John Martin, their ancestor, at the time of his death was seized and possessed in fee simple (in addition to other lands) of the following described lots or parcels of land situated in the County of Harrison and State of Mississippi, and more particularly described as follows, to-wit:—Lots Nos. 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34, block #180 in the said town of Gulfport, now of record in the Chancery Clerk's Office at the court house at Mississippi City, in said county, for the use of said county.

Your orators further represent unto your Honor that William O. Rogers, Jr., Mrs. L. N. Brunswig, and Miss E. M. G. Rogers are each entitled to an equal undivided one third interest in one half of one half of said lands; that Mrs. Rosa Adele Matthews and John B. Martin are each entitled to an equal undivided one half interest in one half of said lands.

Your orators state that they acquired these lands, as before stated, from their ancestor, John Martin, and deraign their title as follows:

First. The aforesaid lands, as appears from the tract book of original entries of government lands in Harrison County, Mississippi,

certified to by James Hill, register of the land office at Jackson, Mississippi, April 11, A. D., 1903, which tract book now forms a part of the public land records in the office of the Clerk of the Chancery Court of Harrison County, Mississippi, shows that the whole of fractional section nine, Township Eight, South Range 11, West, containing 207.52 acres, was sold to James Mc-
4 Laren December 11, A. D., 1834, and that patent for the same was issued by the United States Government to him January 5, A. D., 1841; which said certificate is numbered 1185 and the said patent are duly of record in the land office at Washington City, D. C., and the said patent was duly recorded and filed on August 18, A. D., 1899, in Book 41, pp. 537 and 538, of the Record of Deeds of Harrison County, Mississippi, and that the same is still of record.

Second. The ancestor of these heirs, John Martin, acquired title to these lands under and by virtue of a sale by the Marshall of the United States, William M. Gwin, on the 28th day of October, A. D., 1839, at Jackson, Mississippi, under an execution or executions issued from the United States Circuit Court at Jackson, Mississippi, in the case of Wanzer and Harrison against McLaren and Hammond, and others, to-wit: Sam Hildebrun, Young Smith, & Company, Martin Pleasant, & Company, R. H. Osgood & Company, Seaman & Wards, and Graniss & Brothers, against McLaren & Hammond; which said lands were duly advertised and sold in the City of Jackson, at the front door of the State House; and the said John Martin became the highest and best bidder at and for the sum of seven hundred and sixty dollars, and the same was knocked off to him by said marshal, and the said purchase money was then and there paid by John Martin to the said United States Marshal, and he, John Martin, owned the same until his death, and that his heirs have never sold or disposed of the same in any manner whatever, which facts of sale will more fully and at large appear by reference to a duly certified copy of the records of the said United States Court, a copy of which is herewith filed, marked Exhibit "A," and prayed to be made a part of this, your orators' bill; and
5 your orators further represent that the said John Martin, on the said 28th day of October, A. D., 1839, was solvent and so continued until the time of his death in the year A. D. 1848, having owned a vast amount of property, real and personal, in the states of Mississippi and Louisiana; that the said defendant in execution and also the patentee of said lands yielded up possession of said lands after sale of said lands on the 28th day of October A. D., 1839, and never afterwards during his life exercised any act of ownership or claim whatever over the aforesaid lands. Mr. James McLaren, died many years thereafter without issue, having never married, and leaving neither lineal nor collateral heirs at law, either in the ascending or descending line, capable of inheriting said lands or any of his property.

Your orators further represent, that divers persons set about to defraud and cheat your orators out of the aforesaid lands, and did, without authority at law, sell and convey the same and concealed as

far as possible all facts of this sale, when they knew that John Martin was the owner by virtue of said sale of all the right, title, etc., which the said James McLaren had in and to the lands aforesaid, and that they knew when the said John Martin died in the year 1848, that these heirs of the said John Martin became invested with all the rights, title, and claim to the aforesaid lands which the said John Martin and the said James McLaren had to same. But, notwithstanding this fact, and that they knew of the residence of these heirs and their legal and just rights, yet they did combine and confederate to get possession and dispose of said lands, without authority of law, and did conceal and secrete all the facts from your orators, who were then infants, and that your orators have just of recent years learned the facts in connection with the sale and pur-
6 chase of said lands, and, after learning that they had been defrauded and cheated of their *bona fide* property, they at once set about establishing their claim; hence, the delay in bringing this suit.

Your orators further state that the records of the Circuit Court of the United States, in the State of Mississippi, at Jackson, Mississippi, were, during the war between the Confederate States of America and the United States of America, between the years 1861 and 1865, among which records were the judgments just above described, were taken away, lost and destroyed by the Federal army, and that no copy of the records, in whole or in part, is anywhere to be found, except the one owned by the heirs of the late John Martin, deceased, and which will be introduced, if required by the court, upon the trial of this cause.

Your orators further represent unto your Honor that the records of Hancock County, Mississippi, where the said lands then lay, were burned and destroyed by fire in the year 1853, and that no part of the record of lands can be found in the said county of Hancock or of Harrison, in which the said lands are now situated.

Your orators further represent unto your Honor that the said defendant, J. T. Jones, under a spurious deed, pretends to have some sort of a title to the aforesaid lands and has gone into possession thereof, and without authority, at law, and without having any right or title to the aforesaid lands, himself has given or sold the aforesaid lands to the said defendants, A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington and J. B. Clarke, who constitute the Board of Supervisors of Harrison County, State of Mis-
7 sissippi, pretendedly for the use of the County of Harrison, which said deed is conditional that if the said county of Harrison shall at any time cease to use the aforesaid lot for the purpose of a court house, then, in that event, the said title reverts to the grantor, said Joseph T. Jones, all of which facts will more fully appear by reference to a copy of the deed, dated the 4th day of June, A. D., 1902, and recorded in book No. 54, on pp. — of the Records of Deeds of Harrison County, Mississippi, a copy of which is herewith filed, marked exhibit "D," and made a part of this bill.

That the said J. T. Jones claims the right to own and convey the said land by virtue of a deed dated the 25th day of February, A. D.,

1901, from John Bryant, recorded in Book 47, pp. 126 and 127 of the deed records of Harrison County, Mississippi, a copy of which deed is herewith filed, marked exhibit "C", and made a part of this, your orator's bill of complaint.

Your orators further state, *par parenthesis*, that they are claiming their rights and title to this property under a marshal's sale made under and by virtue of the laws and constitution of the United States of America, and they now and here desire to lay the proper predicate, so that they may have these proceedings in this case revised and reviewed by the Supreme Court of the United States, in case the decision of the Supreme Court of the State of Mississippi is adverse to their lawful, just, and *bona fide* claim,—having derived the same from the patentee of these lands.

Your orators further represent unto your Honor that the said defendant, Joseph T. Jones, has no valid, legal, right or claim to the said lands, and no title either at law or in equity to the same; that, notwithstanding his claim is without legal force and effect,
8 nevertheless, as he has seen proper to place the same upon the records of Harrison County, Mississippi, it casts a doubt, a suspicion, and a shadow upon the fee simple title of your complainants, who are the real owners of said lands, and depreciates the value of the same and prevents them from controlling and selling these lands at their fair market value.

Your orators further represent that said A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and J. B. Clarke, composing the Board of Supervisors of Harrison County, made an order on the minutes of the Board of Supervisors of Harrison County, Mississippi, accepting a deed made to them for the use of said county which is conditional in its character, when they ought to have known, and did know, that said deed, so made to them as aforesaid, was without the pale and authority of law, and conferred no right, title, or interest or claim in and to the aforesaid lands in the County of Harrison, either at law or in equity.

Your orators further say that while said deed, a copy of which is herewith filed, and also the order accepting the same, are void upon their face as being *ultra vires* on the part of said defendants, A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and J. B. Clarke and confers no title whatever, yet your orators say that the said defendants have had said deed placed upon the records of the Court of Chancery, in the County of Harrison and State of Mississippi, in book #54, on pp. — -standing the said scarecrow is innocent in its nature, yet it serves to cast an ugly cloud, doubt, and suspicion upon the title of your complainants, and depreciates the value of the said land and prevents them from controlling and selling them at their real market value.

9 Your orators further represent unto your Honor that while and during the time and before the acceptance of the same, pending the proposition made by Joseph T. Jones to give to the said defendants this deed to the aforesaid lots, to be held by them as trustee for the county and the title to revert to him, in case said trust failed, each and all of the said defendants, A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and J. B. Clarke, while in

session considering the said proposition of said gift of the aforesaid lots, had full and complete notice of the invalidity of the title of their co-defendant the said Joseph T. Jones, in and to the aforesaid lands, and they were then and there, on the said — day of ——, A. D., —— while considering said proposition, in an assembled board, were duly and legally notified of the title and claim of these complainants, when and where they acquired their title, and were further notified that if they bought or in any way acquired the aforesaid lands without the consent or deed of these complainants, it would be done at the risk and peril of the county of Harrison, which they were representing, and that they would, if they accepted the same, involve the county and themselves in litigation of a serious character which would last until the rights of these complainants were either established or denied by the Supreme Court of the United States, which was the court of last resort, as there was a federal question involved in this transaction; that, notwithstanding this earnest and honest effort, the said defendants, A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and J. B. Clarke, constituting the Board of Supervisors of Harrison County, Mississippi, did not even make upon the minutes of their Board the objections and the
10 protest urged by your orators and did not consider said objections on behalf of the people of Harrison County, Mississippi, as it was their duty to do; but they, regardless of the rights of the citizens of Harrison County, not having the fear of God before their eyes, did then and there combine and confederate with their co-defendant, Joseph T. Jones, formerly of Buffalo, New York, but now of Gulfport, Mississippi, to cast a further doubt, suspicion, and cloud upon the title of your orators, did then and there accept this conditional deed of gift in their own name.

Your orators are advised and believe that the said defendants constituting the Board of Supervisors had the legal power and authority to purchase or accept as a gift the lands or premises necessary for the purposes of building the court house and jail and other county site purposes, by virtue of the statute laws of the state of Mississippi, whenever a fee simple title was conveyed to them; but your orators aver that the aforesaid conditional deed is not authorized by law, is against the declared policy of this state, and is in direct violation of section 303, Annotated Code of 1892, of the state of Mississippi, and that it confers no title and without record no shadow of a title upon the county of Harrison or the people of said county.

Your orators further represent unto your Honor that, notwithstanding all these facts, the invalidity of the title of J. T. Jones, the invalidity of the title pretended to be vested in the County of Harrison, the said defendants, A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and J. B. Clarke, composing the Board of Supervisors of said County, having entered upon said lots and have erected and constructed thereon a large and costly building, for the purpose of a court house and all other business necessary for
11 such a purpose, against the protest and consent of your orators, which are both a public and private nuisance and ought and should be abated as they are of no value to your orators and injure and destroy the value of their lands and premises.

Your orators further charge that the said defendants, composing the Board of Supervisors, in their representative capacity, and also in their individual capacity, did enter upon the aforesaid lands of your orators, and did then and there, against the protest and consent of your orators, commit divers wastes, spoils, and destructions in and about the aforesaid premises, merely to vex, harass, and annoy your orators and to injure their property and their title to the same, and that the said defendants did then and there excavate, dig out, and carry away a large amount of the soil, leaving a large hole of great length in the said grounds and that they did erect or begin to erect on or about or over the said lands a jail-house, but did then afterwards combine and confederate with their co-defendant, J. T. Jones, and removed without the consent and against the protest of your orators the jail house thereupon erected at the cost and expense of over $5000, to the people of the County of Harrison in the State of Mississippi; that they did commit other depredations by digging a large, wide, and deep hole on the said plaintiff's lands over which they erected the court-house building, all to the damage of your orators in the sum of Ten Thousand Dollars; that these injuries and trespasses are irreparable in their nature and are a permanent injury to the lands and for which these complainants ask suitable redress and damages in this court; and that these defendants and the County of Harrison be required, within thirty days after the filing of this bill, to remove all buildings erected or constructed upon the aforesaid premises against the will and protests of your orators, or,
12 in default thereof, that the said court house building and all the improvements and appurtenances thereunto appertaining and all the fixtures belonging to the said court house building which are of a freehold nature and are incidents and parts of your orator's premises, be condemned, and forfeited to your orators as the owners of the same, and that all subsequent improvements and additions hereafter made which are of a freehold nature be likewise declared forfeited.

Inasmuch, therefore, as your orators are without remedy, except in a court of equity, and to that end that the said J. T. Jones and the said A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and J. B. Clarke, both *ad* individuals and as members composing the Board of Supervisors of the said County of Harrison, State of Mississippi, and the said County of Harrison, who are made parties to its bill, may be required to make full, true, and direct answer to the same, but not under oath, the oath being hereby expressly waived; and that the said deed of conveyance from the said J. T. Jones, bearing date the 24th day of June, A. D., 1902, to the aforesaid defendants who are members of the Board of Supervisors of Harrison County, Mississippi, and also the deed from S. S. Bullis, bearing date March 1, 1902, to Joseph T. Jones, in and to the aforesaid premises may be set aside and declared void as against your orators as to these lands; that they may be required to give up said deed to be cancelled within the time fixed by the court and that in default thereof the clerk of this Court be required to make up such cancellation upon the records of these deeds; that an account of the

damage, destruction, and waste of a permanent nature be taken by and under the direction of the court that have been committed by these intruders and trespassers, and that a personal decree for
13 the sum of such amount so found due as aforesaid, also for a reasonable rent from the date of the occupation of said land, rendered against the county may be entered against each and every one of the said defendants, A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and J. B. Clarke, and that a similar decree may be entered against the county of Harrison, in the state of Mississippi, and that the clerk of this court may be required to enter a *lis pendens* of this proceeding as required by law, and that your orators may have all such other, further relief, including a writ of assistance to be put in possession of said premises, as equity may require and to your Honor may seem fit.

May it please your Honor to grant a writ of summons directed to the Sheriff of Harrison County, Mississippi, commanding him to summons the said defendants, Joseph T. Jones, the County of Harrison, State of Mississippi, and A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and J. B. Clarke to appear before said court at rules on the second Monday of December next, at the Court-house in Gulfport, Mississippi, then and there to answer this bill.

J. B. MARTIN.

HARPER & HARPER,
Sol's for Complainants.
HARPER & HARPER &
C. H. WILLIAMS,
Att'y for Jno. B. Martin, &
W. J. GEX.

STATE OF MISSISSIPPI,
County of Harrison:

This day personally appeared before the undersigned authority in and for the aforesaid county and state, John B. Martin, one of complainants in the foregoing bill, who, being duly sworn, says on oath that the matters and things set forth in the foregoing bill as stated of his own knowledge are true, and those stated upon
14 information and belief, he believes to be true.

Sworn to and subscribed before me, this the 11th day of November, 1903.

F. S. HEWES,
Chancery Clerk;
By GEO. P. HEWES, *D. C.*

THE STATE OF MISSISSIPPI,
County of Harrison:

In consideration of One Dollar ($1.00), I convey and warrant unto A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and John Clark, composing the Board of Supervisors of said county, and to their successors in office, the following described land, situated

in the town of Gulfport, in said Harrison County, Mississippi, to-wit:

Lots Nos. 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34, in block No. 180, according to the map or plat of said town of Gulfport, now of record in the Chancery Clerk's office, at the court-house, at Mississippi City, in said county, for the use of said Harrison County, Mississippi, as a site for the court house and other appurtenant buildings. And it is understood that whenever the Supervisors of the said county, or the said county at any time, cease to use the said land for a court house and court purposes, then the title thereto shall cease and revert to me and to my heirs and assigns.

Witness my signature, this the twenty fourth day of June, A. D., 1902.

(Signed) J. T. JONES.

THE STATE OF MISSISSIPPI,
County of Harrison:

Personally appeared before me, A. McAlpin, a notary
15 public, in and for the town of Gulfport, in said county, the within named J. T. Jones, who acknowledged that he signed and delivered the foregoing instrument as his act and deed, on the day and year mentioned.

Given under my hand and official seal affixed at my office in said town of Gulfport, this the 24th day of June, A. D., 1902.

[SEAL.] A. McALPIN,
Notary Public.

STATE OF MISSISSIPPI,
Harrison County:

I hereby certify that this instrument was received and filed for record at 8 o'clock and — minutes, A. M., on 5 day of Feb., A. D., 1903, and recorded in record of deeds, Vol. —, No. 54, on pp. —.

EXHIBIT "D".

EXHIBIT "C".

For and in consideration of One Dollar, the receipt of which is hereby acknowledged, and other valuable considerations, I hereby sell, assign, quitclaim, and set over unto J. T. Jones, of Buffalo, New York, all my right, title, and interest in and to a certain contract bearing date November 8th, 1895, relating to lands in Harrison County, State of Mississippi, town of Gulfport, by and between John Bryant, of Cohasset, Massachusetts, and myself, recorded in the Clerk's office of the County of Harrison, State of Mississippi, on the 27th day of January, 1896, in Book #33, page 430.

In witness whereof, I have hereunto set my hand and seal,
16 this First day of March, A. D., 1901.

S. S. BULLIS. [SEAL.]

STATE OF NEW YORK,
County of Cattaraugus, ss:

Be it remembered, that on this twenty four day of March, A. D., 1902, before me, the subscriber, a notary public in and for said county, personally appeared S. S. Bullis, and in due form of law, acknowledged the above indenture to be his act and deed, and desired the same might be recorded as such.

Witness my hand and notarial seal.

[SEAL.] A. J. WILLIAMS,
Notary Public.

My commission Expires 1904.

Filing $.05	$.05
200 words	.20
Certificate	.50
	$.75

The instrument of which the foregoing is a record was delivered to me to be recorded at 3 o'clock, P. M., March 28th, 1902, and recorded April 8th, 1902.

F. S. HEWES, *Clerk.*

Recorded in Book 50, pages 534-535, of the Harrison County Deed Records.

EXHIBIT "A".

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Circuit Court of United States.

WANZER & HARRISON
vs.
MCLARAN & HAMMOND.

Copy of Judgment and Execution of pls. fi fa.

And afterwards, to wit, at the said November term of the
17 Court aforesaid, to wit, on the Sixteenth day of November, in the year of our Lord, one thousand eight hundred and thirty seven, until which time this cause was regularly continued, came the plaintiff aforesaid, by their attorneys, and it appearing to the satisfaction of the court, that the writ aforesaid has been duly executed and the defendants failing to appear, though solemnly called,

It is therefore considered by this court, that the said plaintiffs recover against the said defendants the sum of four thousand, one hundred and twenty one dollars and eighty six cents, for their damages which they have sustained by reason of the premises and also

their costs and charges by them about their suit in this behalf expended.

And the defendants in mercy, etc.

And afterwards, to wit on the 11th day of June 1839, the following execution of *pls fi fa* issued in said cause, which is in the words and figures, to wit:

UNITED STATES OF AMERICA,
Southern District of Mississippi:

The President of the United States to the Marshal of the Southern District of Mississippi, Greeting:

Whereas, at the November term, 1837, of the Circuit Court of the United States, for the Southern District of Mississippi, Moses Wanzer, Iabez Harrison, under the firm of Wanzer and Harrison, received judgment against James McLaren and John C. P. Hammond, under the firm of McLaren and Hammond, for the sum of four thousand, one hundred and twenty one and 86/100 Dollars, with interest thereon at the rate of eight per centum, from the 17th day of November, A. D., 1837, until paid, together with costs and charges by said plaintiffs, in and about their said suit in that behalf expended,

18 whereof the said defendants were convicted, as appears to us of record, and whereas on the 28th day of December, A. D., 1837, an execution of *fieri facias* issued from our said court, directed to the marshal of said district, for the amount of said judgment, interest, and costs, as aforesaid, which execution was issued on certain property of defendants, which said property was suffered to remain in possession of said defendants, upon executing a forthcoming bond according to law, with Samuel C. Faulkner as security, which said bond was returned to our said court at the May term thereof, A. D., 1838, by the marshal aforesaid, "forfeited," and thereby has the force and effect of a judgment according to the statute in such case made and provided, as well as against the said sureties, as against the defendant to the said original execution for said debt, interest, and costs. Now, therefore, you are hereby commanded, as oftentimes before, etc., that the goods and chattels, lands and tenements of the said James McLaran, John C. P. Hammond, and Samuel C. Faulkner, late of your district, you cause to be made the amount of said judgment, interest, and costs, so recovered aforesaid, also the sum of Three Dollars 83-1/3/100, including the costs accrued since the emanation of said execution, and that you have the said sums of money before our said court at the term to be held on the first Monday of November next, to render to said plaintiffs; and have also then and there this writ.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States at Jackson, the first Monday of May, A. D., 1839, and in the 63rd year of the Independence of the United States.

Issued the Eleventh day of June, 1839.

WM. BUMS, *Clerk.*

Endorsement: No security of any kind is to be taken.
19 Wm. Bums, Clerk.

This execution is entitled to a credit of $1239.24, paid on the 6th day of May, 1839. See marshal's return on *fi. fa.* No. 633, to May term, 1839.

WM. BUMS, *Clerk.*

Marshal's Return.

Levied this execution, together with others, viz., Sam'l Hildebrum, Young Smith & Co., Martin Pleasants & Co., R. H. Osgood & Co., Seaman & Ward, and Graniss and Brothers, against McLaran and Hammond and sureties, on the following lands, viz., Lots No. 1, 2, 3, 4, and 5 in Section 2; No. 6, 7, and 8 in Section One, T. 11 Range 8 West (M. R.) South ½ Section 33; N. ½ Section 28; S. W. ¼ Sec. 21; E. ½, N. E. ¼ and E. ½ of S. E. ¼, Sec. 20, in T. 14, R. 6. W. (D. C.) Lots No. 2, 3, 5, and 6, S. 18, T. 8 R. 4 E. (Mad. Co.) Lot No. 3, Sec. 12, T. 5, R. 1 E. (38 acres); The undivided ½ of the whole Sec. 21, E. ½ N. W. ¼ and N. E. ¼, S. E. ¼ and E. ½ S. W. ¼ Sec. 20 T. 7 R. 5. E. The whole of E. ½ N. E. ¼ Section 27; W. ½, N. W. ¼ Sec. 26; S. W. ¼ Sec. 23, and Lot 7 Sec. 22, T. 5, R. 1. E; S. W. ¼ Sec. 9; Lots 5 and 6 Sec. 8, T. 7. R. 3. E; E. ½, N. W. ¼, Sec. 12, T. 5. R. 2. E. (Rankin) E. ½, N. W. ¼ Sec. 32; W. ½ Sec. 33; and W. ½ Sec. 28; S. ½ Sec. 29; N. E. ¼, and E. ½, N. W. ¼ Sec. 29, all in T. 5. R. 6 E. The undivided interest of one half of the last described tracts. And after having duly advertised the said lands they were offered for sale in the City of Jackson, at the front door of the State House, on the 7th day of October, 1839; the defendants, having consented in writing that said sale should take place in Jackson, when the first described tract to wit, 615 43/100 acres on the Mississippi River, was knocked down to Wm. C. Demoss at the price of Six Thousand Dollars. The Second and third tracts consisting of 961 48/100 acres on Deer
20 Creek, in Washington County, were struck off to William Burns at the price of Three Thousand, Eight Hundred Dollars. The first tract consisting of 319 80/100 acres in Madison County, was struck off to Charles M. Laven at the price of Three Hundred Dollars. And the 5th consisting of defendant's interest in Lot No. 3, Section 12. T. 5. R. 1. E. near Jackson, was struck off to James Roach for the sum of Three Hundred and Forty Dollars, and all the balance was sold to Charles McLaren for Fourteen Hundred and thirty five Dollars. The said Demoss, Burns, Roach and McLaren being respectively the highest, best and last bidders for said several tracts of land. This execution together with the others mentioned above was also levied on the following described lands, to wit, Sec. 35 and 36, in T. 7. R. 11 West, and fractional sections 1, 2, 3, 8, 9, and 10 in T. 8. R. 11 West, all lying on or near the sea shore in the vicinity of Mississippi, which said lands, after having been duly advertised were sold in Jackson, on the 28th day of October 1839 to

John Maryin for the sum of Seven Hundred and Sixty Dollars, he being the highest, best and last bidder.

WM. M. GWIN, *Marshall*,
Per F. S. HUNT.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Circuit Court U. S.

I, William H. Brown Clerk of said Court, do hereby certify that the foregoing contains a true and correct copies of the judgment rendered in the case above stated, and also of the execution issued in said case to the Nov'r term 1839 of said Court, together with the endorsements and Marshal/'s return thereon, as the same now remains of record and on file in my office.

21 In testimony whereof I have hereunto set my hand and affixed the seal of the said Court at Jack-on, on the 8th day of March A. D. 1848.

[SEAL.]

W. H. BROWN, *Clk*,
Per CHAS. H. ROGERS, *D. C.*

Filed November 11th, 1903.
F. S. HEWES, *Clerk*.

Summons to Dec'r Rules 1903 issued.

EXHIBIT "C."

Continuation of Exhibit "C."

Book 33, Page 430.

Articles of Agreement on this eighth day of November, A. D. 1895, by and between John Bryant, of Cohasset, State of Massachusetts, party of the first part, and Spencer S. Bullis, of Olean, New York, party of the second part.

The party of the first part is the owner of certain lands situated in the County of Harrison State of Mississippi constituting what is known as the town site of Gulfport, at the Southern terminus of the Gulf and Ship Island R. R. which said Railroad is now incomplete and abandoned; and whereas the party of the first part is desirous of securing the co-operation of the party of the second part in disposing and selling of the above land.

Now therefore this Witnesseth that for and in consideration of the sum of One Dollar to him in hand paid, the receipt of which is hereby acknowledged and also for other valuable considerations, among which is the completion of the Rail Road as hereinafter set forth the party of the second part hereby agrees with the party of the first part as follows to wit—

22 To offer for sale the said lands at such reasonable price as the party of the first part shall elect to place upon them, sell-

ing them by lots or otherwise in the most advantageous manner until he shall realize from such sales the sum of -43,492.42 together with interest on said sum until paid from time to time and all taxes and other expenses necessarily attendant upon the property.

The party of the first part agrees to convey to the party of the second part or his assigns an undivided one half of lands that may remain unsold and also one half of any money, mortgage or note that may remain over and above the said sum of $43,492.42 together with the interest expense and costs as provided above. And for and in consideration of the above the party of the first part agrees to build or cause to be built the Said Gulf & Ship Island Rail Road between Hattie-burg and the Coast with a pier 4500 feet in length & equip the same with at least two locomotives and 40 cars & put the same in operation & establish or cause to be establi-hed lumber operations on said road in such manner as to be of profit and increase the value of said lands or lots at Gulfport.

And the party of the second part hereby agrees to act as agent of the party of the first part for the sale of said lands and assume all expense belonging thereto, such as advertising and other expenses that may be incurred in his actively promoting the sale of the above lands free of all expense to the party of the first part and he agrees to aid in any way consistent with his work of building the said rail-road & establishing lumber operations the sale of said lands or lots. And the meaning of this paragraph is that the party of the second part hereby agrees to further the interests of the party of the
23 first part in disposing of or selling the above lands in the most expeditious and business like manner he can.

And it is further understood and agreed that if the party of the first part shall fail to have said rail road built and in operation by November 15th 1896 then this contract shall at the option of the party of the first part cease and determine and be void, and of no effect but without recourse of either party to the other for damage.

In witness whereof the parties hereunto have set their hands & seal this the Eighth day of November 1895.

JOHN BRYANT. [SEAL.]
SPENCER S. BULLIS. [SEAL.]

Filed November 11th. 1903.
F. S. HEWES, *Clerk.*

Lis Pendens Notice.

To the Board of Supervisors, composed of Harrison Co., to Joseph T. Jones, to A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, & J. B. Clark, individually & to the County of Harrison and the people thereof, and all other persons interested in the hereinafter described real estate:

You will take notice that Wm. O. Rogers Jr., a resident citizen of New York City State of New York, Ellen G. M. Rogers a resident citizen of the City of Madison County of Morris & State of New Jersey, John B. Martin, a resident citizen of the County of Yazoo &

State of Mississippi, Mrs. Rosa Adelen Mathews a resident citizen of the City of New Orleans, & State of Louisiana, Mrs. L. N. Brunswig a resident citizen of New Orleans State of Louisiana Complainants have filed their Bill in Chancery Court of Harrison County Mis-
24 sissippi, as the real owners of the lands hereinafter described to set aside the Deed made to A. J. Bond U. Desporte John Scarborough W. E. Whittington composing the Board of Supervisors of Harrison Co. Miss. for the use of said Harrison County, on the 24th day of June A. D. 1902 to the following described lots Nos. 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, & 34 in block No. 180 according to the map or plat of said town of Gulfport Mississippi now of record in the Chancery Clerk's office at the Court house, and also to cancel the deed of S. S. Bullis bearing date Mch. 1st 1902 to Joseph T. Jones conveying the aforesaid lands with others—& that all the fixtures in and about the Court House building be declared forfeited, if not removed from said building—and that the County of Harrison in the State of Mississippi, and Joseph T. Jones are made defendants; and the following persons as individuals & members of the Board of Supervisors are also made defendants A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, & J. B. Clark.

HARPER & HARPER,
Att'ys for Complainant.

Filed Nov. 11th 1903 at 9 o'clock A. M. & recorded in Record Book A. on page 42.

F. S. HEWES, *Clerk.*

Summons.

The State of Mississippi to the Sheriff Harrison County, in said State:

You are hereby commanded to summon Joseph T. Jones, County of Harrison a quasi corporation of the State — Mississippi, and A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington
25 and J. B. Clark, individuals and members, constituting the Board of Supervisors of the County of Harrison in the State of Mississippi, Defendants, if to be found in your county, to appear before the Clerk of the Chancery Court of the County of Harrison, in the State of Mississippi, on a Rule Day of said Court to be held at the office of said Clerk on the second Monday of December, A. D. 1903, in the town of Gulfport Miss., then and there to plead, answer, or demur to the bill of complaint this day filed in said court by William O. Rogers, Jr., Ellen G. M. Rogers, John B. Martin, Mrs. Rosa Adele Matthews wife of George B. Matthews and Mrs. L. N. Brunswig wife of L. N. Brunswig, Complainants to which they are Defendants. And have there then this Writ.

Given under my hand and seal of said Court, and issued this the 11th day of November, A. D. 1903.

[SEAL.]

F. S. HEWES,
Clerk of the Chancery Court,
By —— ——, *D. C.*

Sheriff's Return.

Received by me this the 11th day of November, A. D. 1903.

A. J. RAMSAY, *Sheriff.*

I have this day executed the within writ personally by delivering to within named A. J. Bond as President of the Board of Supervisors and as an individual and as a member of the Board of Supervisors of Harrison County Mississippi a true copy of this writ this the 16th day of November 1903.

A. J. RAMSAY, *Sheriff,*
FLORIAN SEAL, *D. S.*

26 I have this day executed the within writ personally by delivering to the within named John Scarborough W. E. Whittington, U. Desporte and J. B. Clark as individuals and as members of the Board of Supervisors of Harrison County Mississippi a true copy of this writ this the 7th day of December 1903.

A. J. RAMSAY, *Sheriff.*

I have this day executed the within writ personally by delivering to the within names J. T. Jones a true copy of this writ this the 12th day of November 1903.

A. J. RAMSAY, *Sheriff.*

Returned and filed this 7th day of Decr., A. D., 1904.

F. S. HEWES,
Clerk of the Chancery Court.

Demurrer of J. T. Jones.

J. R. MARTIN ET ALS.
vs.
J. T. JONES ET AL.

And now comes the defendant, Joseph T. Jones, individually and separately from his co-defendants and demurs to the bill of said complainants, and prays the judgment of the court if he shall make any further answer thereto, and he also filed the following causes of demurrer to said bill.

1. That among the facts alleged in said bill and exhibits, John Martin, did not, by virtue of the said alleged sale by the United States Marshal, acquire either the legal or equitable title to said land.

27 2. That the said alleged sale by said Marshal on the 28th day of October 1839, in front of the state house in Jackson, was not made either at the time or place fixed by law for making such sales, and the said sale to the said John Martin was void and conveyed neither the title nor the right to title.

3. The facts alleged in said bill does not warrant the legal conclusion that said complainants are heirs at law of the said John

Martin, nor otherwise show, that they, the complainants, have any right, title or interest in said lands.

4. That said bill is a bill seeking to divest the legal title out of said heirs at law, devisees, or legal representatives of said James McLaren, deceased, but does not make such heirs at law, devisees or legal representatives to this suit, and therefore there is a non-rejoinder of the proper parties.

5. That whatever right or interest the said complainants, or their alleged ancestor, John Martin, acquired under said alleged Marshal's sale is now barred by the ten years' statute of limitations.

6. That the alleged fraudulent concealment that has, for half a century, kept the complainants in the dark as to their rights, is not alleged to have been the act of any of the defendants or of any one in privity with them.

7. Because there is no facts stated in the bill from which any conclusions can be drawn that these parties have been defrauded out of the aforesaid lands, acting in concert with, by the direction of, or in the knowledge of this defendant.

8. Because the bill upon its face shows that these parties have no interest whatever with the subject matter of this litiga-
28 tion.

9. Because there is nothing in the bill charging this defendant with any interest in the subject matter of this litigation, and no relief asked as against this defendant whatever.

10. That there is no equity on the face of the bill.

BOWERS, NEVILLE & CHAFFE,
Solicitors for Defendant.

We hereby certify that in our opinion the above demurrer is well taken and that it should be sustained.

BOWERS, NEVILLE & CHAFFE,
Solicitors for Defendant.

Filed December 7th, 1903.
F. S. HEWES, *Clerk.*

Demurrer of A. J. Bond et al.

THE STATE OF MISSISSIPPI,
County of Harrison:

In the Chancery Court, November Special Term, A. D. 1903.

#1667.

JNO. B. MARTIN ET AL.
v.
JOSEPH T. JONES ET AL.

And now comes the defendants, A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington and J. B. Clarke, individually and as the Board of Supervisors of said County of Harrison, and demurs

to the bill of said complainants, and prays the judgment of the Court if they shall make any further answer thereto, and they
29 assign the following causes of demurrer to said bill:

1st. That upon the facts alleged on said bill and Exhibits, the said John Martin did not, by virtue of the said alleged sale by United States Marshal/ acquire either the legal or equitable title to said land.

2nd. That the said alleged sale by said Marshal/ on the 28th day of October 1839, in front of the State House in Jackson, was not made either at a time or place fixed by law for making such sales, and the said sale to said John Martin was void and carried neither title nor the right to title.

3rd. That the facts alleged in said bill do not warrant the legal conclusion that said complainants are heirs at law of said John Martin, or otherwise show that they, the complainants, have any rights, title or interest in said lands.

4th. That said bill is a bill seeking to divest the legal title out of said heirs at law, devisees, or legal representatives of said James McLaren, Deceased, but does not make such heirs at law, devisees or legal representatives parties to this suit, and therefore there is a non rejoinder of proper parties.

5th. That whatever rights, or interest the said complainants, or their alleged ancestor, John Martin, acquired under said alleged Marshal's sale is now barred by the ten years' statute of limitations.

6th. That the alleged fraudulent concealment that has for half a century kept complainants in the dark as to their rights, is not alleged to have been the acts of any of the defendants, or of any
30 person in privity with them.

7th. That there is no law in Mississippi, that awards to the informer or first discoverer, lands, or County buildings, which a Board of Supervisors accept without a fee simple title, and therefore it is a matter of no concern to complainants whether said conveyance from Joseph T. Jones to said Board is valid or invalid.

8th. That there is no equity on the face of said bill.

W. G. EVANS,
FORD & WHITE,
Solicitors for Defendants.

We hereby certify that in our opinion the above demurrer is well taken and that it should be sustained.

W. G. EVANS,
FORD & WHITE,
Solicitors.

Filed December 24th, 1903.

F. S. HEWES, *Clerk.*

Order to Set Down on Separate Demurrer of J. T. Jones.

THE STATE OF MISSISSIPPI,
Harrison County:

In Chancery Court, February Term, A. D. 1904.

JOHN B. MARTIN ET AL.
vs.
J. T. JONES ET AL.

The Clerk will set this cause down on bill of complain*ants* and separate demurrer of J. T. Jones to the same.

BOWERS & NEVILLE,
Solicitors for Defendant-.

Filed Feb'y 1st, 1904.
F. S. HEWES, *Clerk.*

31 *Order to Set Down.*

1667.

JNO. B. MARTIN ET AL.
v.
J. T. JONES ET AL.

The Clerk will set this cause down on Demurrer to Complainants bill of Complaint.

FORD & WHITE &
W. G. EVANS,
Sol's for Def'ts.

Filed February 1st, 1904.
F. S. HEWES, *Clerk.*

Decree.

1667.

WM. O. ROGERS ET AL.
v.
J. T. JONES ET AL.

The demurrer of defendants to the Complainants' bill, having been submitted to the court in term time, & having been taken under advisement, for a decree in vacation, & the Court having heard the same and being advised in the premises, & being of the opinion that the demurrer in said cause is not well taken, it is thereupon ordered that the same be and is hereby overruled, & that defendants have sixty days from this date in which to answer.

Ordered, adjudged this the 23rd of March, 1904.

STONE DEAVOURS, *Chancellor.*

Filed March 26th, 1904.
F. S. HEWES, *Clerk.*

32 *Petition for Appeal.*

THE STATE OF MISSISSIPPI,
Harrison County:

Chancery Court.

No. —.

WILLIAM G. ROGERS ET ALS., Complainants,
vs.
JOSEPH T. JONES and HARRISON COUNTY, by its BOARD OF SUPERVISORS, Defendants.

To the Honorable Stone Deavours, Chancellor:

Your petitioners show that said cause was heard by your Honor at Hattiesburg, Mississippi, in vacation, on the — day of March, 1904, upon the separate demurrers of said defendants to the bill of complaint filed in this cause by complainants, and that your Honor did on the said 23rd day of March, 1904, order, adjudge and decree that said demurrers be and *is* overruled, and from which said decree overruling said demurrer the said defendants Joseph T. Jones and the County of Harrison now apply and ask your Honor to grant them an appeal to the Supreme Court of Mississippi from said decree so made overruling said demurrer, on such terms and conditions as the law directs, and for which they will ever pray.

BOWERS, NEVILLE & CHAFFE,
Solicitors for Joseph T. Jones.
W. G. EVANS &
WHITE & FORD,
Solicitors for Harrison County.

Filed this 5 day of April 1904.
F. S. HEWES, *Clerk.*

33 *Decree Granting Appeal.*

No. 1667.

WILLIAM G. ROGERS ET ALS., Complainants,
vs.
JOSEPH T. JONES and HARRISON COUNTY, by its BOARD OF SUPERVISORS, Defendants.

The petition of said defendants having this day been presented to me, Stone Deavours, Chancellor of the Second Chancery Court District of Mississippi, asking for an appeal from a decree rendered by me in vacation at Hattiesburg, Mississippi, in said cause on the 23rd day of March, 1904, overruling demurrers filed by defendants in the above stated cause by the Defendants separately *and* the Chancellor

after considering said petition, and in compliance with the law in this behalf, doth order, adjudge and decree that the said defendants Joseph T. Jones and the County of Harrison be and are hereby granted an appeal to the Supreme Court of the State of Mississippi from said order so overruling said demurrers. Said appeal is granted to the County of Harrison without said County being required to file an appeal bond, and that the said Joseph T. Jones is granted such appeal upon his entering into bond in the sum of Five Hundred Dollars, conditioned as by law directed, which said bond may be approved by the Clerk of the Chancery Court of the County of Harrison.

Ordered, adjudged and decreed on this the 28th day of March, 1904.

STONE DEAVOURS, *Chancellor.*

Filed this 5 day of April 1904.
F. S. HEWES, *Clerk.*

34 *Certificate.*

THE STATE OF MISSISSIPPI,
Harrison County:

I, F. S. Hewes, Clerk of the Chancery Court of said County and State, hereby certify that the foregoing 33 pages contain a true, correct and complete transcript of all the pleadings, evidence, orders and Decree appealed from in the case of William O. Rogers, Jr., *et al.*, Complainant-, *vs.* J. T. Jones and Board of Supervisors of Harrison County, Mississippi, Defendants, No. 1667 of said Court, as the same remain on file in my office.

Given under my hand and seal of said Court at Gulfport Mississippi this 22nd day of August A. D. 1904.

F. S. HEWES, *Clerk.*

Statement of fee for transcript; Summons, copy of bond and binding fee $11.45 which has not been paid.

F. S. HEWES, *Clerk.*

35 *Bond for Appeal without Supersedeas from Decree of Chancery Court.*

Secs. 32, 48, 50, 57, 59, and 60, Code 1892.

STATE OF MISSISSIPPI,
Harrison County:

Know all men by these Presents: That we, T. J. Jones, principal, and J. T. Jones, Thos. P. Hale, and Jas. H. Neville sureties, are held — firmly bound unto William G. Rogers *et als.* in the sum of Five Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands, and delivered this the 5th day of April, A. D. 1904.

The condition of this obligation is, That, whereas a decree was rendered by the Chancellor in vacation at Hattiesburg, in said State, on the 23rd day of March, A. D. 1904, in the case in said Court styled "No. 1667, of William T. Rogers *et al. vs.* J. T. Jones, *et al.* adjudging that the Demurrer filed by the Defendants in said Cause to the Bill of Complaint be and the same is overruled".

Now, if said J. T. Jones principal obligor herein, shall pay all the costs of appeal in case said decree be affirmed as to —h—, the appellant-, by the Supreme Court of the State of Mississippi, to which Court an appeal from said decree is to be prosecuted, then this obligation shall be void.

(Signed) J. T. JONES.
THOS P. HALE.
JAS. H. NEVILLE.

The above bond is approved and filed, this the 8th day of April, A. D. 1904.

F. S. HEWES,
Chancery Clerk.

36 *Summons to Supreme Court from Chancery Court.*

Secs. 72, 3413, and 4342, Annotated Code 1892.

The State of Mississippi to the Sheriff of Harrison County, in said State:

You are hereby commanded to summon William O. Rogers, Jr., Ellen G. M. Rogers, John B. Martin, Mrs. Rosa Adele Matthews, wife of Geo. B. Matthews, and Mrs. L. N. Brunsiwg, wife of L. N. Brunswig, Harper & Harper, C. H. Williams & W. J. Gex Appellees, or their Attorneys in fact or of record, if to be found in your County, to appear before the Supreme Court of the State of Mississippi, at the Capitol in the city of Jackson, in the County of Hinds, and State aforesaid, on the second Monday and 10th day of October, A. D. 1904, then and there to answer the appeal of Joseph T. Jones and Harrison County by its Board of Supervisors, from a decree, rendered in vacation, of the Chancery Court of the County of Harrison in said State, by the Chancellor, rendered against said Appellants on the 23rd day of March A. D. 1904 in favor of said Appellees, overruling demurrers filed by Appellants in the case of William O. Rogers Jr. *et als. vs.* Joseph T. Jones and Harrison County, No. 1667 of said Chancery Court by the appellants separately, and have there then this writ.

Given under my hand and the seal of said Chancery Court, at my office in Gulfport, Miss., and issued this the 26th day of April, A. D. 1904.

F. S. HEWES,
Chancery Clerk.

37 *Final Decree.*

Supreme Court of Mississippi, April Term, A. D. 1905.

MONDAY, *June 26th*, 1905.

#11365.

J. T. JONES ET AL.
vs.
W. O. ROGERS ET AL.

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Harrison County, *and* the Court having sufficiently examined and considered the same, and being of opinion that there is error therein, doth order, adjudge, and decree that the decree of said Chancery Court rendered in the cause on the 23rd day of March 1904, be and the same is hereby reversed, and the demurrer sustained and the cause remanded. And that appellees do pay the costs of this appeal to be taxed, &c.

38 *Supreme Court Opinion.*

STATE OF MISSISSIPPI:

Supreme Court, April Term, A. D. 1905.

Hon. Albert H. Whitfield, Chief Justice.
Hon. S. S. Calhoon and Jeff Truly, Associate Justices.

On the 26th day of June 1905 the following opinion was delivered by the Court:

J. T. JONES ET AL.
vs.
W. O. ROGERS ET AL.

HOUSTON, *S. J.:*

11365.

J. T. JONES ET AL.
v.
W. O. ROGERS ET AL.

HOUSTON, *S. J.:*

This was a bill filed Nov. 11th 1903 by appellees, Wm. O.
39 Rogers *et al.* against J. T. Jones, and Harrison County and also against the five parties constituting the Board of Supervisors of said County, as individuals and as members composing said Board, to remove clouds from the title of complainants, to certain lots in Gulfport, Harrison County, upon which the county court

house and — have been erected,—specifically praying that a deed from S. S. Bullis to J. T. Jones, dated March 1st, 1902, and one from J. T. Jones to said defendants, members of the Board of Supervisors, dated June 24th, 1902, to said lands, be cancelled and declared void as against complainants; that a writ of assistance issue to put complainants in possession of said lands, and that an accounting of the damage, destruction and waste of a permanent nature committed by defendants be taken, and personal decree be rendered against them for the amount found due, and also for a reasonable rent from the date of their occupation of said land.

The bill alleges that complainants "are the lineal descendants and sole surviving heirs at law of John Martin, deceased, who was their "*ancestor,*" and who died intestate in New Orleans, La., in 1848, seized and possessed in fee simple" of said land. And they deraign their title as follows:

1st. A sale of said land to James McLaren Dec. 11th 1834 and a patent issued to him by the United States Government January 5th, 1841.

2nd. A purchase by their said "ancestor" at a sale made by United States Marshal, Gwin, on Oct. *28th,* 1839 at Jackson, Miss. under an execution issued June 11th, 1839 on a judgment rendered by the United States Circuit Court at Jackson, Miss. Nov. 16th, 1837, in the case of Wanzer & Harrison *et al. v.* McLaren & Hammond; that said lands were duly advertised and sold in the City of Jackson, at the front door of the State House, at which sale, they aver, that
40 "said John Martin became the highest bidder for $760; that said lands were knocked off to him and he then and there paid the purchase money to said U. S. Marshal, and that he (Martin) owned the same until his death, and th*is* his heirs had never sold or disposed of same in any manner whatever; that said Jas. McLaren defendant in execution and also patentee of said lands, *yielded up possession* of said land after sale of same on Oct. 28th, 1839, and never afterwards during his life exercised any acts of ownership or claim whatever over same; that *divers* persons *set about* to defraud and cheat complainants out "of said lands, and did, without authority of law, sell and convey same and concealed as far as possible all facts of this sale, when *they* knew that John Martin was the owner by virtue of said sale of all the right, title &c. which said McLaren had in and to said lands; and they knew when Martin died in 1848, that his said heirs became vested with all the right and title thereto which said Martin and McLaren had to same. But, notwithstanding this fact and that they know of the residence of complainants, yet they did combine and confederate to get possession and dispose of said lands, and did conceal and secrete all the facts from complainants, who were *then* infants; and that complainants have just of *recent years* learned the *facts* in connection with the *sale* and *purchase* of said lands, and, after learning that they had been defrauded and cheated of their *bona fide* property, they at once set about establishing their claim; hence the delay in bringing this suit."

It further alleges that J. T. Jones under a spurious deed, duly recorded, pretends to have title to said lands and has gone into *posses-*

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sion thereof, and, although he had no right or title, *me* made a deed thereto to Harrison County, or to the members composing its Board of Supervisors and to their successors in office,—con-
41 ditioned that if said county shall at any time cease to use said land for a court house and court purposes, then the title shall cease and revert to said grantor; that said Board did then and there combine and confederate with codefendant, Jones, to cast a further doubt and cloud on the title of complainants, and did then and there record an order on their Minutes, accepting this conditional deed of gift in their own name, over the objection and protest of complainants; and that said deed and order of acceptance are void under §303 Code 1892, as being *ultra vires;* that said Board has erected on said land a court house, &c., against the consent and protest of said complainants, which constitute a public and private nuisance and ought to be abated. A copy of both of the above deeds, and also of the judgment, execution and return thereon, are made exhibits to the bill.

In view of the importance of this suit and of the facts that we have been informed that this is a test case as to many others involving the same question,—we have thus fully set out all of the material allegations of the bill, in order that the grounds upon which our decision is based, may be manifest.

To this bill separate demurrers were interposed, by J. T. Jones, and by his co-defendants the members of the Board—both in their individual and official capacities; but the main ground of both demurrers are substantially the same. Aside from the *general* ground of want of equity on the face of the bill,—for the sake of brevity and prespicuity,—the *special* causes of demurrer assigned may be grouped as follows:

1st. That the allegations of the bill do not warrant the *legal* conclusion that complainants are all the heirs at law of John Martin, or that they have any title or interest in said lands.

2nd. That the bill seeks to divest the legal title out of the heirs at law, devisees or legal representatives of James McLaren,
42 the patentee and defendant in execution, but does not make any of them parties; and, hence, there is a non-rejoinder of parties.

3rd. That, upon the facts averred in the bill and exhibits, the alleged sale of Oct. 28th, 1839 was not made either at the time or place fixed by law for making such sales and was void, and John Martin acquired neither the legal nor equitable title to said lands thereat.

4th. That whatever right or interest complainants or John Martin acquired under said sale, is now barred by the ten years statute of limitations.

5th. That the alleged fraudulent concealment, that has, for a half century, kept complainants in the dark as to their rights, is not alleged to have been the act of any of defendants, or any one in privity with them.

6th. No facts stated from which any *conclusion* can be drawn that complainants have been defrauded by any one acting in concert with, or in knowledge of, defendants.

Both demurrers being overruled, the defendants were granted, and prosecuted this appeal.

We waive a discussion of the 1st and 2nd causes of demurrer as above set forth,—as, in our opinion, the case can and should be decided upon *broader* lines.

In bills to remove clouds from title, certain general principles have been so well and so long settled in this state, as to have become almost axiomatic, in fact, it would hardly be necessary to *state* them but that their proper application to the facts alleged in the bill and exhibits in this cause, will, in our opinion, be determinative of this controversy.

Those general principles are, that when a party comes into a court of equity and asks its active intervention to vest a title in him or to remove clouds from his title and cancel the title of a defendant,—it is incumbent upon him to allege and show that he had a *perfect* legal or a *perfect* equitable title to the property; that if he fails
43 in this he must necessarily fail in his suit,—as, without such a title, he is not the "*real owner*" within the contemplation and the very language of our statute. § 500 Code 1892,—as was expressly held as far back as 1873 in the case of Carlisle *v.* Tindal, 49 Miss. 229, in construing the words "*real owners*" used in §975 Code 1871.

And this, regardless of whether the title of defendant be *good* or *bad, valid* or *invalid*. Complainant- in such cases have no reason to concern themselves about the title of the *adversary* and cannot even bring it in *question*. In fact, a complainant need not even point out any defects in defendant's claim, even though he may describe in his bill the instrument on which such claim is based. He cannot maintain his suit because of any *defects* that may exist in *defendant's* title. He must recover, if at all, on the *validity* of his *own*.

It would be but a vain parade of research to cite all of the decisions of this court sustaining these propositions,—which of course are recognized by learned counsel for appellees. Many cases will be found in the annotations under § 500, Code 1892.

We deem it necessary to cite the following (not annotated) which *distinctly* and *specifically* announce these principles. Hart *v.* Bloomfield, 66 Miss., 100; Goff *v.* Cole, 71 Miss. 46; Wilkinson *v.* Hiller, 71 Miss. 678; Gregory *v.* Brogan, 74 Miss. 699; Wilberger *v.* Pucket, 78 Miss., 650.

Now, waiving any discussion as to the validity or invalidity of the title of defendants under their respective deeds, which would be but a cons*pum*tion of time, in view of the conclusion we have reached,—let us consider whether the bill and exhibits allege such facts as to show that complainants have either a perfect legal or a perfect equitable title to the lands for which they bring this suit.

It will be observed that the bill does not aver, and complainants do not claim, that they, or their ancestors, John Martin, have, or ever had, a *deed* of any kind whatever to said lands, or that
44 they became the real owners by adverse, open and notorious possession thereof.

Upon what, then, do they base their claim that they are the real

owners, either legal or equitable, of the lots in controversy? This is answered, not only by the brief of counsel for appellees; but, after alleging the Marshal's sale of Oct. 28th, 1839, before mentioned, the bill *expressly* and *explicitly* alleges "that they (complainants) "are claiming their rights and title to this property under this *Marshal's sale.*"

Without considering or deciding as to whether McLaren, to whom no patent was issued until January 5th, *1841*, had any title subject to sale under execution on Oct. 28th, *1839*, or as to whether the pleadings show that this was a sale under a *valid* execution, based upon a valid judgment; and if so, whether said judgment had been previously satisfied,—we proceed to consider exhibit "A" filed with the bill,—which under § 528 Code 1892, "must be considered on demurrer as if copied in the bill." Indeed, the bill specifically states that the "facts of this sale will more *fully* and at *large* appear" by reference to "Exhibit A," which is prayed to be made a part" thereof. This "Exhibit A" is a certified copy of the following papers:

1st. A judgment by default, rendered Nov. 16th, 1837 by the U. S. Circuit Court in the case of Wanzer & Harrison *v.* McLaren & Hammond, for the sum of $4121.86.

2nd. The execution issued, June 11th, 1839, on said judgment.

3rd. The Marshal's return on said execution. This return shows that the Marshal made two *separate, different* and independent sales of lands under this execution. The recitals of the return which relate to the sale of the *lands in controversy,* on Oct. 28th, 1839, are as follows:

"This execution, together with the others mentioned above, was also levied on the following described lands to wit: Sec. 35 &
45 36 in T. 7 R. 11 West and fractional sections 1, 2, 3, 8, 9, & 10 in T. 8 R. 11 West, all lying on or near the sea shore in the *vicinity* of Miss.; which said lands, after having been duly advertised, were sold in *Jackson,* on the *28th* day of Oct. 1839 to John Martin, for the sum of $760, he being the highest, best and last bidder," signed "Wm. M. Gwin, Marshal, per *F. S. Hunt.*"

It will be noted that this *return* does *not* even recite or show that John Martin through whom complainants claim, ever *paid* his $760 bid for said land; but the *bill does* allege this, and hence, on demurrer, this fact must be taken as admitted.

It will also be observed that this sale and return purport to have been made and the return is signed, not by the U. S. Marshal *himself,* but by "Wm. Gwin, Marshal, per *F. S. Hunt,*"—while the bill alleges that the "sale was made by the *Marshal* of the U. S., *Wm. M. Gwin.*"

Of course, it is well settled in this State that when an exhibit is made a part of the bill, by §528 Code 1892, and is contradictory to some averment in the bill, the fact will be taken in conformity with the Exhibit. House *v.* Gamble, 78 Miss. 259; McNeill *v.* Lee, 79 Miss., 459.

It is insisted by appellants that the question as to whether the alleged return by the U. S. Marshal is in *fact* such a return by said

officer, or by some private person, and the *legal construction* to be given this return are questions for the *court*, regardless of the averments of the bill; that the so-called return is not signed by any person *claiming* or *assuming* to act as the U. S. Marshal, or by any person *styling* himself the deputy or properly authorized agent of such officer; that *who "F. S. Hunt"* was, no where appears from this record, and that, therefore, the sale was void.

We refrain from deciding the question thus presented,—preferring to predicate our conclusions upon other and more important
46 grounds, for, in our opinion, this sale to John Martin is absolutely void, under well recognized principles, for many reasons, *inter alia:*

1st. Because the land alleged to have been sold was *insufficiently* described. The return on the execution utterly fails to show the county or the State in which said lands were situated, nor does it show anything from which this can be determined.

It described all of the lands sold at that sale as "lying on or near the sea-shore in the *'vicinity'* of Miss."

According to this description, none of this land was *in* this State *at all*, but was "in the *'vicinity'* of Miss."

Certainly, to be in the *"vicinity"* of a certain county or state is not to be *in* that county or state, but to be *outside* of it,—though near it—only in the *neighborhood* of it.

"Etymologically and by common understanding,—"*in the vicinity*" means in the neighborhood, and "neighborhood" as applied to place, signifies nearness.

"In the vicinity" does not mean adjoining to or abutting on, but merely close by, or neighboring country." Webster's International Dict. Revised & Enlarged; Anderson's Law Dict. Title "Vicinity"; English's Law Dict., Title "Vicinity"; Vol. 8 of "Words & Phrases Judicially Defined," p. 7317; 29 Am. & Eng. Ency. of Law (2nd Ed.) p. 1056.

We deem this so clear as to require no further comment.

The other descriptive words *"on or near* the *seashore"* cannot help the description, for the land might be "on or near the sea-shore" and still be in any state from Mexico to Florida,—except Mississippi,—for the recital describing the land as being "in the *vicinity* of Miss." shows absolutely that it is not *in this* State.

2nd. This sale was not made at the place prescribed and required by the law under which it was made. The language of the statutes in force at the time this sale was made, as to *where* such
47 sales should occur, is clear and unmistakable.

Section 3 of Act of Congress, approved May 19th, 1828, provided: "that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States and proceedings thereon, *shall* be the same, * * * in each state respectively as are now used in courts of *such* States" &c. Beers *v.* Haughton, 9 Peters, p. 337, (Lawyer's Ed. Book 9, 149) Smith *v.* Cockrell, 6 Wallace, 756, (L. Ed. Vol. 18, 973).

This statute is the origin of §914 of the Rev. Stats. U. S.

Section 4 of a special Act of Congress approved Feby. 16th 1838

provides: "That the marshal of the several Districts of the State of Mississippi, in addition to the several sale days now allowed by law, may be authorized to sell property at the *Court House* in *each County* on Monday of each week, and on the 1st and 2nd days of each term of the District Court; and he may, at the *written request of the defendant,* change the sale of property to the *place* where the U. S. Court for the district is holden; provided, in the opinion of the marshal, the interest of the plaintiff is not compromised thereby."

The Mississippi statute which governed such sales at the time this one was made provided, that all sales of land should be made at the *Court House* of the *County,* and on the 1st and 3rd Mondays of each month. §17 of Act of June 22nd, 1822—How. & Hutcht. Digest, 633. Decisions of the Supreme Court of the United States, as well as of various states, have placed beyond the realm of controversy, the proposition that United States Marshals in the sale of property under execution *must* sell it in *strict conformity* to the State law,—otherwise it is void and can confer no title whatever. Smith *v.* Cockrell, 6 Wallace 756-L. Ed. Vol. 18,973; Boneman *v.* Norris, 49 Fed. R. 438.

Statutes fixing the place of sale of lands under executions are *mandatory* and *not* merely *directory,* and it is the *imperative*
48 duty of officers to make such sales at the very place designated, and a sale made at any *other* place, is not *voidable* merely, but absolutely *null* and *void.* The place of sale is the very *essence* of the sale and strict compliance with the statute is absolutely esssential in order to transfer a good title to realty. Koch *v.* Bridges, 45 Miss., 257; Londermilk *v.* Copening, 101 N. C. 549; Sinclair *v.* Stanley, 64 Texas, 67; In Moody's heirs *vs.* Moeller, (Tex.), 13 Am. St. Rep. 839, (the Texas statute being the same as Mississippi's as to the place of sale)—a U. S. Marshal made the sale, not in front of the door of the *Court House* of the *County,* but in front of the door of the *U. S. Court* Building, standing just on the opposite side of the street from the County Court House. The court held that the sale was not simply and merely *voidable,* but was absolutely *void,* incapable of ratification and subject to a *collateral* attack, and that the acquiescence of the defendant in the execution in such a void judicial sale gave no validity to it.

It is perhaps, proper in this connection to call attention to the allegation of the bill that the lots in controversy were, at the time of the sale, in fractional section *9,* T. 8. R. 11. West, of *Hancock* County,—though they are now, of course, situated in *Harrison* County,—which was formed out of Hancock County in 1841.

The return of the marshal expressly recites that these lands were sold,—not at the Court House,—in the county of Hancock, where the land was then situated, but *"in Jackson."*

The law (which was *mandatory* and *not* merely *directory*), made it the imperative duty of the Marshal to sell this land at the *County Court House* of the County where the land was situated,—except where the defendant in execution should make a *written request* otherwise,—in which event *only,* was the Marshal legally authorized or empowered to "change the sale of the property to the *place* where

the *U. S. Court* for the dis[illegible]ict is holden." The existence of
49 this "written request" on the part of James McLaren, the defendant in the execution, was a necessary pre-requisite and a condition precedent to the power of the Marshal to sell this land "in *Jackson*" or at any place other than at the *Court House* of *Hancock* County. It was the *sine qua non* of his authority. Without it, he was, by the very provision and language of the statute, only "authorized to sell property at the Court House in *each* county," where the land was situated. Being a condition precedent, and a *vital, jurisdicitonal* fact,—his return must have been shown and proved it. Its existence cannot be *presumed*. Only the writing proves it. Congress certainly would never have required, not only that such a request be made, but that it should be a *written* request, if it had intended that it could be established by *presumptions* or *suppositions* or *inferences*. But even if it were permissible to indulge in vague presumptions in regard to *vital, jurisdictional* facts affecting the title to land,—we think the presumptions which could be drawn from this record would all be against the existence of a "written request."

As stated, this same Marshal or party, made two separate and independent sales of land under this execution; and in his return as to the *first* sale (of lands other than those here involved) made Oct. *7th*, 1839, he not only expressly recited that, that this *first* sale was made at the front door of the State House, in the City of Jackson, but also specifically recited that the "defendant had *consented* in writing that said sale should take place at Jackson"; and yet, although in his return as to the sale in *controversy*, made three weeks later, he sets out, or purports to set out, all of his acts as to this last sale,—not one sentence or syllable is said as to the existence of any such written request, or of any character of request, of James McLaren that the land should be sold in "Jackson."

This return, setting out with great particularity, the existence of
50 the "written request" and all the facts, as to *one* sale of certain *other* lands and being noticeably and strangely silent as to the existence of any request relative to the sale of the land in question, would seem to be presumptive evidence of its non-existence. But even if we should presume or assume that there was a "written request," then the Marshal only had authority, under the statutes cited, to change the sale of this land from the County Court House, "to the *place* where the *U. S. Court* for the district is holden."

While the first sale is recited to have occurred in the City of Jackson at the front door of the State House,—the second sale is merely recited to have occurred *"in Jackson,"* though the *bill* does aver that the sale occurred at the *front door* of the *State House* in Jackson.

In our opinion, the word "place" as used in the statute did not mean *any* or *every* place in the town in which the Court might be holden, but the *particular* place,—the *special* place in which the United States Court held its sittings. Surely, the statute ought not to be construed to mean that the mere naming of the city in which the court sat and the sale of land anywhere within the broad limits of that city, would sufficiently designate the "place where it was held, or be a strict compliance with the statute as to the sale of realty; and

it nowhere appears, either in the bill or exhibits that the State House in Jackson, was, at the time of this sale, the "*place*" where the United States Court was holden. Hartley *v.* Cazye, 38 Minn., 325.

Taking the pleadings as to all of these matters most strongly against the pleader, we hold the Marshal, instead of strictly conforming to the statutes in the sale of this land, palpably violated their plain provisions. While it is admitted that the bill and exhibits do not allege or show that the Marshal executed a deed to John Martin, the alleged ancestor of complainants, or that he or
51 they ever had a deed of any kind whatsoever to said land, or that any such deed ever existed,—still able counsel for appellee contend (to use their own language) "that the bill alleges circumstances and facts from which the court is compelled to presume that a deed was made in this instance, after an interval of sixty years," inasmuch as it was the habit of said Martin to record his other deeds and as the bill alleges that the records of Hancock County were destroyed by fire in 1853 and that the records of the *judgments* of the U. S. Court were taken away, lost or destroyed in 1861 to 1865.

Even if the habit of John Martin to record his *other* deeds would be presumptive evidence, in favor of the pleader, (against whom the pleading must be taken most strongly) that this *particular* deed existed and was recorded (where the pleader fails to so allege) still we find nothing in this record to show that such was the habit of said Martin. As to the destruction of the records, while the bill alleges "that no part of the records of land can be found in the said county of Hancock or Harrison, in which said lands were situated," yet it totally fails to show that any such deed was ever recorded on those records, or that any such deed ever in fact existed. As a matter quite of course if no such deed ever existed, (and the pleader does not allege that it did), then it could never have been recorded on those records, and hence the allegation as the records being destroyed, becomes immaterial. At least, we are not authorized, under the law, to presume therefrom that this particular deed was actually executed and also that it was actually recorded thereon; and after thus creating one presumption in order to supply the facts which the pleader has failed to allege, then go a step further, and on this presumption raise and found another presumption, that all of the prerequisites and jurisdictional facts existed, authorizing the execution by the Marshal of this very deed.

52 However, it is further insisted that after an interval of sixty years, the Court should presume that this deed was actually executed, because in the first part of the bill it is alleged "that complainant's ancestor, John Martin, at the time of his death in 1848, was seized and possessed in fee simple of these lands;" and because the bill afterward avers, "that the defendant in the execution and the patentee of said lands *yielded up possession* of same after the sale of said lands on the 28th day of Oct. 1839."

In our opinion, the first allegation just quoted, must be construed to mean simply, merely and only that *constructive* possession which the law imputes to the holder of the legal title, and not that John Martin even then (away back in 1848) was in the *actual* possession

of said land. At best, it was but the statement of the *legal conclusion* of the pleader and not a statement of the *fact* that said Martin was in truth, in the *actual* possession thereof; and, therefore, it is not admitted by the demurrer. This same observation applies to other averments of the bill, many of which are merely *legal conclusions.*

It will be perceived that the second allegation just quoted merely says that the defendant in execution "*yielded up possession*" of these lands "after" their sale. It does not show when or to *to whom* he "yielded up possession,"—whether to John Martin or to some one else; and if to John Martin, *how long* this was *after* the sale. If it be said that this means *immediately* after the sale, in 1839,—he "yielded up possession," then how long did Martin remain in possession and what *time* and by *whom*, and *how* was he dispossessed. Not one of these facts is alleged sufficiently distinct and positive allegation even that Martin or anyone claiming under him, was ever, *at any time*, in the actual possession of these lands,—as *could* easily have been done, and as the rules of pleadings require *should* have been done, if they were facts, and complainants desired to rely upon them.

53 Under elementary principles of law, requiring us to construe pleadings most strongly against the pleader,—we do not feel authorized to supplement the pleadings with our suppositions or to supply the facts with our presumptions, and assume that a certain state of facts existed in favor of the pleader,—which he himself does not allege,—in order to presume that a certain deed in his favor was duly and legally executed and delivered. On the contrary, after sixty years have elapsed since this sale, and when the complainants fail to aver that there was any deed duly executed, or that their ancestor ever took possession, or that he or they remained in possession (especially when they allege that *defendants* are now in possession), and when they rely *solely* and *merely* on the *return* of an officer under an execution,—it would seem, that if any presumptions should be indulged in, it should be *against* the complainants *and against* the existence of the deed.

In the case of Cooper *v.* Granberry, 33 Miss., 117, the Court said that "in the absence of a showing that his (complainants) bid was consummated by a deed, it will be presumed after this lapse of time (15 years) that he transferred his bid or did some act denouncing it,"—holding also that a return or execution does not transfer the *title*, but at most only gives a *right* to demand a *deed* conveying the *title.*

The case of Normant *v.* Eureka Co. (Ala.), 39 Am. St. Rep. 45, expressly holds that before the court will presume that a deed was made by the officer, the purchaser must establish the fact that he, not only *went* into possession under the sale, but *continued* in possession.

But even if this sale was a valid one, still we are clearly of the opinion that whatever rights complainants or John Martin may have acquired thereunder have been lost, and that they were barred by the statute of limitations when this suit was instituted on Nov. 11th,

1903, which was over sixty-four years after this sale occurred. Even if we could presume or infer from the allegations of the bill that John Martin went into possession and was in possession until his death in 1848,—still that was fifty-five years before complain-
54 ants brought this suit to recover this land; and §2731 Code 1892, requires "a person claiming land in equity" to bring his suit to recover same within the "period" of ten years after the right to recover it accrues; and this without regard to any question of adverse possession or whether the defendants have been in the adverse possession of the land or not. The adverse possession of the defendant has nothing to do with the question or with the operation of this particular statute. A complainant has a right to bring his suit in *equity* for land whether he is in possession or not and whether defendant is in possession or not; and if he does not bring it within the period of ten years after his right of action in a court of *equity* accrues, he is barred. The provisions of §2731 relate to a "period" of *time* within which suits to recover land may be brought by any one "claiming the same in equity." This §2731, in our opinion, is in the nature of a statute of rest. The complainants here are "claiming this land in equity" and not having brought their suit to recover it within the "period" prescribed by §2731, are clearly barred,—unless the allegations of their bill, bring them within the last clause thereof, which is as follows: "But in every case of concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered."

The bill only avers in a general, vague and indefinite way "that after the sale (which was over sixty four years ago) that "*divers* persons" (without stating *who*) set about to cheat and defraud them out of the lands (without stating *how*) sell and convey same, combined and confederated to get possession and sispose thereof, and concealed and secreted as far as possible all facts of this sale from complainants who have just of recent years learned the facts.

These allegations immediately follow the statement in the
55 bill as to the purchase of the land by Martin in 1839; and, construing the pleadings most strongly against the pleader, it would seem that these "divers persons" must have set about "*at once*" to cheat and defraud, get possession of this land and sispose of it, or it may be that it was not until the more recent year of the death of Martin in 1848, as his death is expressly alluded to in this same sentence and connection and just before the charge of the combination and confederacy is set forth; and although this last date even was fifty-five years ago,—yet complainants aver only in a general way, that they learned of the facts just of "recent years," without stating how long they had known of it, or what diligence they exercised in trying to discover it sooner.

To prevent this statute from beginning to run against them in favor of defendants, complainants must not only allege 1st, fraud and the facts or acts constituting it; 2nd, that these acts of fraud

were committed by defendants or some one in privity with them; 3rd, that they were concealed from complainants by defendants or their privies; 4th, that complainants did not discover or know of this fraud over ten years before instituting their suit, but 5th, they must also allege and show that they exercised reasonable diligence to discover it sooner, or that they could not with reasonable diligence, have discovered it sooner.

In our opinion, the bill in this case fails to sufficiently aver or show all or any of these necessary facts.

The bill does not disclose who the "divers persons" were who combined and confederated to cheat and defraud complainants and to conceal and secrete the facts; but the defendant Jones was hardly one of them, as the bill alleges he was formerly of Buffalo, New York, but now of Gulfport, Miss., and the first connection that he or the other defendants had with these lands, so far as shown by the bill and exhibits was in 1902. But however this may be, the bill wholly fails to connect Jones or any of the defendants, or their privies with these alleged acts of fraud; and this was absolutely necessary in order to prevent the running of the statute of
56 limitations against complainants, or to affect the rights of defendants, Edwards *v.* Gibbs *et al.* 39 Miss., 166; Flemming *v.* Grafton, 54 Miss., 79.

In addition, the particular acts which constituted the fraud, combination or confederacy are not alleged in the bill, but mere vague, indefinite, general and uncertain averments are made.

And no principle is more firmly settled or more familiar to the profession that that fraud will not be inferred or presumed, and cannot be charged in general terms, but that the specific and positive facts which constitute it must be distinctly and definitely averred, and it must be shown that defendants participated therein.

This doctrine is nowhere more clearly, concisely, and forcibly stated than by Judge Truly in the recent case of Weir *v.* Jones, 36. Sou. Rep., 533-4, where the decisions are collated and cited. It is too well established, and too widely recognized, to require a further citation of authorities.

This opinion has been extended beyond ordinary limits; but as this appeal was prosecuted to settle the principles of the cause for future guidance, not only in this suit, but in others now pending we have deemed it necessary to sacrifice brevity in order to attempt to attain perspicuity, especially as after a careful consideration of this record, we have found ourselves unable to concur with the learned Chancellor in his conclusions.

We think that the demurrer ought to have been sustained. (The italics in this opinion are ours.)

The decree is reversed, the demurrer sustained and cause remanded.

57 I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, do hereby certify the foregoing to be a true copy of the opinion of said Court, delivered in the cause hereinbefore stated, as the same appears of record on file in my office.

In testimony whereof, I hereunto set my hand and seal of said Court, at office at Jackson, this 31st day of July, 1905.

[SEAL.] GEO. C. MYERS, *Clerk.*

Filed this 1st day of August 1905.

58 Were present and in attendance on said Court, the Honorable T. A. Wood, Chancellor of the Eighth Chancery Court District of the State of Mississippi; Florian Seal, Sheriff of said Harrison County, and F. S. Hewes, Clerk of said Court.

Mandate.

The State of Mississippi to the Honorable Chancery Court of Harrison County, Greeting:

Whereas, on the 26th day of June 1905, the same being a day of the regular term of our Supreme Court, begun and held in the Court Room, in the Capitol, in the City of Jackson, in said State, on the 1st Monday of April in the year of our Lord, 1905 the following final decree was rendered by our Supreme Court, to-wit:

No. 11365.

J. T. JONES ET AL.
v.
W. O. ROGERS ET AL.

This cause having been submitted on a former day of this term, on the record herein, from the Chancery Court of Harrison County, and this Court having sufficiently examined and considered the same, and being of opinion that there is error therein, doth order, adjudge & decree that the decree of said Chancery Court rendered in this cause at the term thereof, A. D. 190–, on the 23rd day of March 1904, be and the same is hereby reversed and cause remanded.

And that the Appellee do pay the costs of this appeal, to be taxed, &c.

You are Therefore Hereby Commanded, That such execution and further proceedings be had in said cause, as according to right and justice, the judgment of our Supreme Court and the law of the land ought to be had.

Witness, the Hon. Albert H. Whitfield, Chief Justice of our Supreme Court; also the signature of the Clerk, and the Seal of said Court, hereunto affixed at office Jackson, this the 31st day of July A. D. 1905.

[SEAL.] GEO. C. MYERS, *Clerk.*

Filed this 1 day of August 1905.

F. S. HEWES, *Clerk.*

59 *Caption.*

2nd Appeal.

THE STATE OF MISSISSIPPI,
Harrison County:

A special term of the Chancery Court for the County of Harrison State of Mississippi, was begun and held at the Court-house of said county, in the City of Gulfport in said county and State, being the place designated by law for holding said court, on the second Monday of December A. D. 1905, being the 11th day of December A. D. 1905, in accordance with the following order, made by the Honorable T. A. Wood, Chancellor, of the Eighth Chancery Court District of the State of Mississippi, to-wit:

THE STATE OF MISSISSIPPI,
Harrison County:

The regular October 1905 term of the Chancery Court for Harrison County, Mississippi, having been pretermitted because of yellow fever then prevailing at Gulfport, Mississippi, and the business of the Court now requiring it, a special term of said Court for said County has been, and is hereby, ordered to convene at the Court-House of said County, in Gulfport, Mississippi, beginning on the second Monday of December, 1905, and to continue in term for a space of two weeks, or so long thereof as the business of the Court may require.

The Clerk of said Court will enter this on the vacation Minutes of said Court and give due notice of the time and place of holding said special Term.

Ordered, adjudged and decreed this 3rd. day of November, 1905.

T. A. WOOD, *Chancellor.*

and upon two weeks notice of the time and place of holding said special term of said Court, given by the Clerk of said Court, by publication of said notice, in the Biloxi Herald, a newspaper published in said County, at least two weeks previous to the holding of said special term of said Court, as per proof of publication thereof, presented and filed.

60 *Motion to Amend.*

1667.

WM. O. ROGERS, JR., ET AL.,
vs.
JOSEPH T. JONES ET AL.

And now comes the said Complainant & move to amend their Bill in the cause & herewith tenders the same.

HARPER & HARPER,
Attorneys for Complainants.

Filed Dec. 11th, 1905.
F. S. HEWES, *Clk,*
By JNO. J. MURPHY, *D. C.*

Decree Amending Bill.

1667.

WM. O. ROGERS, JR., ET AL.,
vs.
J. T. JONES ET AL.

This cause having been reversed by the appellate Court and remanding, this day coming on to be heard on the Demurrer to the original Bill of Complaint and also on Motion by the Complainants to Amend their Bill, it is ordered adjudged and decreed that the said Demurrer be sustained and the Complainants are given leave to file their amended Bill tendered with said Motion and that the Defendants be allowed one day & such further time as may be agreed upon by the respective counsel to plead answer or demur to said Amended Bill.

Ordered adjudged & decreed this the 13th day of December, 1905.

J. O. SANDERS,
Special Chancellor.

Filed Dec. 13th, 1905.
F. S. HEWES, *Clk.*
By JNO. J. MURPHY, *D. C.*

61 *Amended Bill of Complaint and Exhibits.*

STATE OF MISSISSIPPI,
Harrison County:

Chancery Court, February Term, A. D. 1904.

To the Honorable Chancery Court of Harrison County, Mississippi:

W. O. ROGERS, JR., a Resident Citizen of the State of New York, City of New York; ELLEN G. M. ROGERS, a Citizen of Madison, County of Morris, and State of New Jersey; JOHN B. MARTIN, a Resident Citizen of Yazoo City, and State of Mississippi; Mrs. ROAS ADELE MARTIN MATTHEWS, Wife of George B. Matthews, Mrs. L. N. BRUNSWIG, Wife of L. N. Brunswig, Resident Citizens of the City of New Orleans, and State of Louisiana, Complainants,

vs.

JOSEPH T. JONES, a Resident Citizen of the Town of Gulfport, County of Harrison, and State of Mississippi; and THE COUNTY OF HARRISON, a quasi Corporation of the State of Mississippi; A. J. BOND, U. DESPORTE, JOHN SCARBOROUGH, W. E. WHITTINGTON, and J. B. CLARK, Both as Individuals and as Members of the Board of Supervisors of the County of Harrison and State of Mississippi, all Residents of the County of Harrison and the State of Mississippi, Defendants.

Your orators by this their amended bill of complaint filed by leave of Court first had and obtained, respectfully represents unto

your honorable court that they are the legal descendants and the sole surviving heirs at law of John Martin, deceased, who died intestate in the City of New Orleans and State of Louisiana, during the year 1848; they further represent that the said John Martin, their ancestor, at the time of his death, was seized and possessed of in fee simple in addition to other lands of the following described lands or parcels of lands situated in the town of Gulfport, County of Harrison and State of Mississippi, and more particularly described as follows, namely:

62 Lots No. 22-23-24-25-26-27-28-29-30-31-32-33-34, Block 180 in the town of Gulfport, according to a map or plat of the said town of Gulfport, as appears in the Chancery Clerk's office at Gulfport, Mississippi, in said County of Harrison.

Your orators further represent unto your honor that W. O. Rogers, Jr., Mrs. L. N. Brunswig, Miss. Ellen G. M. Rogers are entitled to an equal undivided one third interest in and to one half of the aforesaid lands as heirs at law of their ancestor, John Martin; that Mrs. Rosa Adele Martin Matthews, and John B. Martin, are entitled to an equal one half interest in one half of said lands and they are tenants in common with the other parties just mentioned, all having derived their title from their common ancestor John Martin by descent who acquired these lands at execution sale and these complainants derive their title as follows.

First. The aforesaid land as appears from the tract book of original entry of government land in Harrison County, Mississippi, certified by James Hill, register of the land office at Jackson, Mississippi, April 11th, 1903, which tract book now forms a part of the public records in the office of the public records of the Chancery Court of Harrison County, Mississippi and shows that the whole of fractional section 9, township 8, of range 11 West, which includes these lands and contains 207 52/100 acres was sold to James McLaren, December 11, A. D. 1834, and that a patent for the same was issued by the United States Government to James McLaren on January 5th, 1841, which said certificate is numbered 1185, and the said patent is duly recorded in the land office at Washington, D. C., and was also recorded upon the 18th day of August 1899 in the County of Harrison and State aforesaid in book 41 of the record of deeds in said county, on page- 537-538 and is still of record there.

Second. John Martin the ancestor of these heirs acquired title to the lands under and by virtue of a judicial sale made by the

63 United States Marshall on the 28th day of October 1839, before the front door of the State House at the Capitol of Mississippi, at Jackson, Mississippi, where the United States Circuit Court was then held and said sale was conducted in all respects according to law and made under judgments had and obtained in the United States Circuit Court at Jackson, Mississippi, and executions issued thereunder in the case of Wanzer & Harrison *vs.* McLaren & Hammond. Sam Hilderbaum *vs.* McLaren & Hammond. Young Smith & Company *vs.* McLaren & Hammond. Martin Pleasants & Company *vs.* McLaren & Hammond. R. H. Osgood & Company *vs.* McLaren & Hammond. Seaman & Ward *vs.* McLaren & Hammond.

Granise Brothers *vs.* McLaren & Hammond; and that the said John Martin became the highest and best bidder at and for the sum of $760.00 and the same was knocked off to him by the United States Marshal William M. Gwyn, and the said purchase money was then and there paid by the said John Martin to the said Marshal aforesaid and the said John Martin then and there was put into possession of the aforesaid land by William M. Gwyn by and with the consent of the aforesaid McLaren and the said John Martin remained in the continuous, uninterrupted and undisputed possession of the said land claiming the same as his property by the title acquired by him at this sale, until his death in the year 1848.

At his death, having never sold the aforesaid lands, they descended to his heirs at law having made no will or disposition of any kind of the said lands, and his heirs have never sold or disposed of any part of said land since they became the owners by descent from their common ancestor. These heirs aforesaid have been all the while in the constructive possession of these lands mentioned since the death of John Martin, their father, in 1848, as no person or persons ever went into actual possession of the same until the County of Harrison or the Board of Supervisors thereof went into
64 possession as a donation from Joseph T. Jones, at the time and in the manner hereinafter set forth.

Your orators further charge that under the aforesaid judgment and executions levies were made in all the cases mentioned of these and divers other lands situated in the Counties of Washington, Hinds, Scott, Madison, and Rankin in the State of Mississippi and these said lands were sold by the said Marshal/ William M. Gwyn on the 7th day of October A. D. 1839, also at the front door of the State House in Jackson, Mississippi, the building where the Federal Court of the United States was held at that time and at the same place and by the same officer that all these lands herein sued for were sold.

That the lands which were sold on October 28th, A D. 1834 which embraces the lands in this suit as well as the lands sold on the 7th day of October 1839, were sold under an Act of Congress of the United States at Jackson, Mississippi, in accordance with law and at the written request of the defendant, James McLaren.

Your orator further states that the United States Marshal when he sold the land on the 7th day of October A. D. 1839, amounting in the aggregate to many thousand acres, in each and every instance, made a deed of conveyance to the several parties who purchased the lands, to-wit: William C. Demoss, William Burns, Charles McLaren, and James Roach, and these deeds were recorded and are now of record in the several Counties in which the lands lay. If these facts are denied under oath your orators ask leave to file at the hearing of this cause a certified copy of all the said deeds in and to the lands made and recorded in the years 1839 and 1840.

Your orators further state that the aforesaid Marshal, William M. Gwyn, was a discreet, conscientious and careful officer and was
65 in the habit, as the record shows, of making deeds to the lands sold by him at Marshal's sale, soon after the sales were made.

Your orators further aver and declare the facts to be that the lands herein claimed and sued for were a part and parcel of the lands patented by James McLaren in 1841 and had been entered by said McLaren in the year 1834 as appears from the certificate which is numbered in the office at Washington 1185; these lands at the time of their being entered lay in Hancock County/ Harrison County having since been formed, from a portion of Hancock and other Counties.

Your orators further charge, as before stated that under and by virtue of the United States Marshal's sale made by the said William M. Gwyn, Marshal in the State of Mississippi in 1839, on the 28th day of October under an Act of Congress, approved — day of —— A. D. —— sold the same under the judgments and executions before mentioned, which said judgments and executions and sales were valid in all respects, and the said sale was made at Jackson, Mississippi, before the State House door of the Capitol, that being the place and the building where the Circuit Court of the United States, under which judgments and executions were obtained were held. All the aforesaid land was knocked off to the highest and best bidder, namely, John Martin at and for the sum of $760.00 which said sum as before stated was then and there paid to the said United States Marshal and by virtue of this sale a complete, equitable and inchoate legal title was acquired by John Martin to these lands at that time, and at his death this title became vested in his heirs; and that your orators believe, having no personal knowledge of the facts, that a deed was made by the said Marshal to the said John Martin and that the law presumes from all the facts herein stated and from the lapse of time, that a deed was made as it ought to have been, and if the Supreme Court of this State shall decide against the validity
66 of this sale these your orators claim the right and benefit of an appeal from said final decree to the Supreme Court of the United States. A certified copy of the said Judgment & Execution & proceedings in the case of Wanzer & Harrison *vs.* McLaren & Hammond is herewith filed marked Exhibit A & made a part of this bill.

Your orators further aver that John Martin after his purchase, continued in possession of all these lands bought by him at said sale, being two whole sections, 35-36 and *t* fractional sections in the County of Hancock, State of Mississippi, claiming them as his *won* by virtue of said sale and exercising all such acts of ownership as these lands in their wild state were capable and susceptible of. The lands were sandy and barren, covered with pine forests non-productive as agricultural lands, and the heirs of John Martin after his death, being small children, continued in the constructive possession of these identical lots, 22-23-24-25-26-27-28-29-30-31-32-33-34, Block 180 in the town of Gulfport, Mississippi, according to the plat or map of the said town of Gulfport, now of record in the office of the Chancery Clerk of Harrison County until the — day of —— A. D. 1902, at which time the said Joseph T. Jones, put the said defendants before mentioned, and the said County of Harrison the said defendants composing the said Board of Supervisors of Harrison County, into the possession of these lands, which had never been,

until that time in the actual possession of any person or persons since the death of John Martin.

Your orators further represent unto your honor that the record of Hancock County, Mississippi, where the lands herein involved were at the time situated, were destroyed by fire in the year 1863 without any fault on the part of your orators, and the records of all the deeds were destroyed.

Your orators further represent that they are advised and believe that these judgments under which executions issued were removed from Jackson, Mississippi, during the late War between the
67 States and have not been found but that a memorandum found in the possession of one William McCaughan before his death, disclosed the judgments to be as follows:

Wanzer & Harrison obtained judgment against McLaren & Hammond on the 17th day of November 1837 for the sum of $4,041.80 and was represented by attorneys Buckner & Stewart. Sam Hilderbum obtained judgment November 24th, 1837 for the sum of $1,882.51 and was represented by attorneys Tarpley & Gaylor. Young Smith & Company obtained judgment for the sum of $2,092.75 November 23, 1837 and was represented by attorney Norcan. Martin Pleasants & Company obtained Judgment May — 1838 for the sum of $7,805.33 and was represented by attorneys Reeves Hughes and Clifton. R. H. Osgood & Company obtained judgment June 5th, 1838 for the sum of $1,197.19 and was represented by attorneys Taylor and Tarpley. Seaman & Ward obtained judgment June 11th, 1838 for the sum of $1,027.83 and was represented by attorney J. S. Yerger. Granise & Brothers obtained judgment June 5th, 1838 for the sum of $2,242.22 and was represented by attorneys Buckner & Fant and if these memorandums are denied under oath by the defendant your orators ask leave to file a copy of the same at the hearing.

From the examination of the records of the several Counties in this State where John Martin the ancestor of your orators, bought land both at private and judicial sales it is discovered in these instances he has had his deeds recorded in the Counties where the lands lay and we believe that this was his usual business habit and your orators believe that the deed to this land was filed in Hancock County and was destroyed when the court house was burned.

Your orators further state t-at the said John Martin was entirely solvent up to the time of his death and that James McLaren died intestate and up to the time of his death was never known to have exercised any act of ownership or control over these lands without the deed of this sale by William M. Gwyn at Jackson, Mis-
68 sissippi, October 28th, 1839 and that the said James McLaren left no heirs at law either lineal or collateral in the ascending or the descending line and that this property was never escheated to the State of Mississippi.

Your orators further represent that the said James McLaren left an administrator, at least J. J. McCaughan appears as the administrator of the personal property. Just when he was appointed to take charge of this matter and thus coming into possession of all the

papers is not known, but very soon after the death of John Martin, J. J. McCaughan applied to the Clerk of the United States Court at Jackson, Mississippi, and procured a certified copy of the judgment and the execution and sale and proceedings, under one of these aforesaid judgments and of this identical body of land which with this land was the property of John Martin's children, all of whom were small and of tender years at the time, and living with their mother in the City of New Orleans, Louisiana. Notwithstanding these facts your orators believe that the said J. J. McCaughan without authority set to work to deprive these heirs of their legal right and title to this land. It was given out that it was not certain to whom this land belonged and a Company was organized known as the Mississippi Land Company, who took charge of the portion of these lands, concealing the facts of this judicial sale, with a certified copy of the judgments in his pocket at the time.

Your orators are not informed as to the names of the men who com-osed this Company, as a long time has elapsed since the formation and there is no record now in existence which discloses their names. Your orators are advised however, that J. J. McRae once Governor of Mississippi was solicited by letter to become a member of the Mississippi Land Company and to assist in taking charge and disposing of these lands. His reply was in substance these words.

"As to the Land Company I can have nothing to do with it.
69 I do not know who these lands belong to but I do know that it does not belong to me or to you."

Your orators further state that it having been the business of this Land Company to keep the facts of the real ownership from the legal heirs of John Martin, the traffic went forward of some of the said lands, without their knowledge or their legal rights to said property until within the last four or five years; that just as soon as the facts of their father's purchase and ownership was made known to them, that they at once, set about to take all necessary legal steps and to begin suit in order to establish their claim to the aforesaid land and they have filed suit for the same in the courts of Harrison County, Mississippi, to remove clouds from their title and asking to be put in possession of this land. This they did even before they had secured from the heirs of J. J. McCaughan the one certified copy of the judgments and executions and sales which furbishes their muniment of title. After asserting their rights without delay by filing a *lis pendens* notice in the Chancery Court, of their intention to assert, and if possible, to maintain their right to all these lands a copy of which notice is herewith filed marked exhibit B and made a part of this bill.

Your orators assert that immediately after hearing all these facts they instituted suit and employed an able and accurate examiner of title to go to Jackson and Raymond, Mississippi, the County sites of Hinds County, Mississippi, where the United States Federal Courts were held in the year 1839 and had an exhaustive examination made of all the records and papers in this proceeding. This expert duly reported that in his opinion the records in this case had been tampered with by other than Federal soldiers. The Complainants then

sent to Montgomery, Alabama, where it is said these papers had been shipped during the War but after the most diligent search they failed to find the record in said cause. So it is may it please your honor, that this certified copy procured by J. J. McCaughan
70 soon after the death of John Martin, is the only muniment of title that has escaped the ravages of time.

Your orators made a thorough and diligent search in Alabama, Mississippi, and Louisiana and in all places where these were most likely to be found for the original deeds of lands owned by John Martin in said States, and while they have numerous copies of the records of deeds in said States yet on account of the lapse of time, the War and the fires they have failed to find any original deeds to any lands belonging to John Martin in the State of Mississippi or elsewhere.

Your orator further avers that after having exhausted all reasonable search and inquiry to ascertain their status in relation to the sale made by Marshal Gwyn and failing to find muniment of title among the debris of scattered records and documents they were forced to procure and rely upon this certified copy found in the hands of the heirs of J. J. McCaughan, namely his son, William McCaughan; and that the said McCaughan after having tried to dispose of this paper to J. T. Jones and others for a stipulated price, finally consented to turn over this evidence of the right and title of your orators to this property to the Martin heirs, these complainants, this certified copy which had been kept concealed since the year 1848, the year of the death of John Martin, was brought out for the first time and was transferred in the month of June 1903 to the heirs of said John Martin by the said William McCaughan, on terms which it is unnecessary to mention, and turned over to them in June 1903 as above stated, and this is the first time they had any right as far as their title is concerned, to proceed to enforce its claim upon the aforesaid land.

By virtue of a deed dated March 1st, 1901, wherein one S. S. Bullis of New York, quit-claimed unto J. T. Jones of Buffalo, New York, all his right, title and interest in and to a certain contract, bearing date November 8, 1895, relating to lands in Harrison County, Mississippi, by and between John Bryant of Cohassett, Mas-
71 sachusetts, and the said defendant, J. T. Jones recorded the same in the office of the Circuit Clerk in the County of Harrison and State of Mississippi, on the 27th day of January 1896, in book 33, page 430, a copy of which is herewith filed, marked exhibit "C" and made a part of this bill, claiming an indefinite right and title of some kind, wholly unknown and unexplained to your complainants, to these lots or parcels of land laying in the town of Gulfport, County of Harrison and State of Mississippi and involved in this suit. And your orators further say that if S. S. Bullis even intended to convey any legal interest or title to the same to the said J. T. Jones, it was void because it was impossible to have held a legal title to the said lands and that he had no right to make any transfer of such a title as the law required. This conveyance to J. T. Jones shows its own want of validity, as the few lines in which it is ex-

pressed contains no words or syllable of description of the lands attempted to be conveyed and of course, does not give to J. T. Jones even a color of title to these lands sued for as they are not described in said instrument and the description of the land intended to be conveyed being necessary to pre-icate a *legal, adverse possession*. A copy of the agreement or the deed to J. T. Jones from John Bryant dated February 25 A. D. 1901 is herewith filed, marked exhibit "F" and made a part of this bill.

Your orators state that they have shown that the said John Martin acquired a perfect equitable and inchoate legal title by his purchase on the 28th day of October 1839, and while they admit that they do not know of their own personal knowledge but think the Marshal of the United States did at that time make John Martin a deed to this land sued for but they believe and the law presumes that he did make such a deed at this time from the facts that he made the deeds which are now of record to all the other lands sold under the judgments and executions aforesaid under which these
72 same lands were sold, and that Marshal Gwyn was a faithful and intelligent officer and in all his business habits was accurate and painstaking, and it was his custom and habit to make deeds to lands sold by him as Marshal, and this coupled with the great lapse of time is strong presumptive evidence that a deed was in reality made by the said Marshal.

Although the said J. T. Jones has no valid title to these lands yet he claims them and has nothing to establish his title except the deed from S. S. Bullis, dated March 1st, 1901 and a contract with John Bryant, dated November 8, 1895, and has placed these instruments of writing on record in the office of the Chancery Clerk in Harrison County, Mississippi, which together with his conditional deed of gift to Harrison County, Mississippi or these defendants, members of the board of supervisors has cast a cloud and doubt and a suspicion upon the title of your orators which depreciates their value and prevents your orators from controlling the same and selling them at a fair market value.

Your orators further charge that the said J. T. Jones has conveyed the aforesaid lots of land in Gulfport as a conditional donation to the said defendants A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, and J. B. Clark, who constitute the Board of Supervisors of Harrison County, Mississippi, ostensibly for the use of Harrison County, but that the said deed is made conditional; that if the County of Harrison should at any time cease to use the aforesaid lots as a Court House the lots should revert to the said J. T. Jones, the grantor, all which facts will appear by reference to a copy of the deed dated June 4th, 1902, recorded in book 54 of the record of deeds of Harrison County, Mississippi, a copy of which is herewith filed marked exhibit "D" and made a part of this bill.

Your orators further aver that these parties defendant composing the Board of Supervisors of Harrison County, Mississippi, made an order accepting this deed of donation made to them as a gift to said County conditional in its character, is invalid as the said deed was

outside the pale and authority of the law and conferred no
73 legal or equitable title to the said County of Harrison because the said Board of Supervisors did not have the legal power and authority to accept as a gift or even to purchase the premises, the lands necessary to build a court house or a jail unless a fee simple title was given in express terms. The acceptance of such a deed as was given by J. T. Jones to Harrison County, Mississippi, was in violation of the express terms of section 303, Annotated Code of 1892 of Mississippi and is in violation of the declared policy of the commonwealth of Mississippi.

Your orators charge specifically and directly that these defendants before the acceptance of this deed by gift and pending the proposition of J. T. Jones, were notified expressly while they were considering the proposition, of the invalidity of the title of the said defendant J. T. Jones in and to the said lots; that they had full notice of the claim and title of these complainants and had full notice of the fraud that had been practiced upon them from start to finish by J. J. McCaughan and his coadjutors and they charged specifically that these defendants participated fully in said fraud and became *particeps criminis* in this whole transaction, accepting the same in spite of the remonstrance of these orators and with the intent to hinder, delay and defraud them of their just right and title to this property and also that they the said members of the Board of Supervisors never paid even one dollar for the said lands and did not even make a notice of the objections and the protest which had been brought to their notice and presented in open court for their consideration and their action, and that the members of the Board of Supervisors in this, combined and confederated with J. T. Jones to cast a further doubt upon the title of your complainants by accepting this illegal gift in their own name and by going into possession of said lands on the — day of —— A. D., 1902, which said lots as before stated had never been in the actual possession of any one since the death of John Martin, but had been clearly in the constructive possession of your orators in and through all these intervening years.

74 Notwithstanding the utter invalidity of the title of J. T. Jones and the invalidity of the pretended title to these lots, transferred to the Board of Supervisors of Harrison County said defendants, A. J. Bond, John Scarborough, W. E. Whittington, U. Desporte, and J. B. Clark, both as individuals and as members of the Board of Supervisors, against the earnest protest of your orators entered upon said lots and have erected a costly building for the purpose of a court house, which can be of no use to your orators and they have had the deed made by the said J. T. Jones put upon the records of deeds in the office of the Chancery Clerk in Gulfport, Harrison County, Mississippi, which also casts a cloud upon the title of your complainants.

In as much therefore as your orators are without remedy in the premises except in a court of equity and to the end that the said J. T. Jones and the said Board of Supervisors and the said County of Harrison and the said A. J. Bond, U. Desporte, W. E. Whittington, John Scarborough, and J. B. Clark both as individuals and as

members of the Board of Supervisors were made parties defendant to this bill, may be required to make full true and direct answers to said bill but not under oath, said oath being hereby waived and that upon a final hearing the said deed of conveyance from the said J. T. Jones in and to the aforesaid parcel of land lying in the town of Gulfport, County of Harrison and State of Mississippi, to these defendants who are members of the Board of Supervisors of Harrison County, Mississippi to a deed or contract from S. S. Bullis bearing date March 1st, 1902 and also a contract bearing date November 8th, 1893 or 95 wherein S. S. Bullis quit-claimed unto J. T. Jones all of his right, title and interest in and to this contract relating to lands in Harrison County Mississippi, made by and between John Bryant and the said defendant J. T. Jones, recorded in the office of the Chancery Clerk in the town of Gulfport, County of Harrison and
75 State of Mississippi, on the 27th day of January A. D. 1896 in book 33 page 432, a copy of which is herewith filed marked exhibit "C" and made a part of this bill; and that these deeds and contracts may be set aside and declared void as to these lands involved in this suit and situated in the town of Gulfport, County of Harrison and State of Mississippi, and that the clerk of this court be required to make cancellation upon the margin of the record of deeds as far as these lands are concerned; that all the buildings of the court house and the appurtenances thereto which are incident to the free hold be declared forfeited and condemned as to these defendants and declared to be the lawful property of your orators and that all improvements and additions that may be hereafter made be likewise declared forfeited, and that a reasonable rent from the date of acceptance of said lands and court house, be decreed against the county of Harrison, and against each and all of the said Board of Supervisors, namely, A. J. Bond, U. Desporte, W. E. Whittington, John Scarborough, and J. B. Clark and that the Clerk of said Court be appointed a commissioner to state the —— and be required to make a *lis pendens* notice of this proceeding as required by law; that your orators may have all such other and further and general relief including a writ of error to be put in possession of said premises as equity may require and to your honor may seem meet.

May it please your honor to grant this writ of summons directed to the sheriff of Harrison County, commanding him to summons the said defendant, J. T. Jones, the County of Harrison, a *quasi* corporation of the State of Mississippi, A. J. Bond, U. Desporte, W. E. Whittington, John Scarborough, and J. B. Clark, as individuals and as members composing the Board of Supervisors of said County, to appear before said court at rules on the 2nd Monday of December next or at such time as the court may direct, at the court house of Gulfport, Mississippi, then and there to answer this bill.

HARPER & HARPER,
Solicitors for the Complainant.

75½ STATE OF NEW YORK
& City of New York:

This day personally appeared before me the undersigned Notary Public in and for the City & State of New York, Wm. O. Rogers, Jr. one of the complainants of the foregoing bill who being duly sworn says on oath that the matters and things set forth in the foregoing bill as stated of his own knowledge are true & those stated upon information & belief he believes to be true.

WM. O. ROGERS, JR.

Sworn to and subscribed before me this the 10th day of November A. D. 1905.

[SEAL.] SAMUEL HEYMAN,
Notary Public, New York County.

#203.

76 EXHIBIT "A."

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Circuit Court of the United States.

WANZER & HARRISON
vs.
McLAREN & HAMMOND.

Copy of Judgment and Execution of Plaintiff's Fi. fa.

And afterwards, to-wit: at the said November Term of the Court aforesaid, to-wit: on the 16th day of November in the year of our Lord, One Thousand Eight hundred and thirty seven, until which time this cause was regularly continued, came the plaintiffs aforesaid by their attorneys and it appearing to the satisfaction of the court that the writ aforesaid has been duly executed and the defendant failing to appear though solemnly called: It is therefore considered by the court that the said plaintiffs recover against the said defendant the sum of four thousand one hundred and twenty-one dollars and eighty-six cents, for their damages which they have sustained by reason of the premises and also their costs and charges, by them about their suit in this behalf expended.

And the said defendants in mercy, etc.

And afterwards to-wit: on the 11th day of June, 1839, the following execution of plaintiff's *Fi. fa* issued in said case, which is in words and figures to-wit:

UNITED STATES OF AMERICA,
Southern District of Mississippi, ss:

The President of the United States to the Marshal of the Southern District of Mississippi, Greeting:

Whereas at the November term 1837 of the Circuit Court of the United States for the Dist. of Mississippi, Moses Wanzer and Jabez Harrison, under the firm of Wanzer & Harrison, recovered judgment against James McLaren & John C. I. Hammond under the firm name of McLaren & Hammond, for the sum of Four Thousand One Hundred and Twenty One and 86/100 Dollars, with interest thereon, at the rate of eight per centum per annum, from the 17th day
77 of November A. D. 1837, until paid, together with costs and charges by said plaintiffs in and about their said suit, in that behalf expended whereof the said defendants were convicted as appears to us of record and whereas on the 28th day of December, A. D. 1837 an execution of *fieri facias* issued from our said court directed to the Marshall of said District, for the amount of said judgment, interest and costs as aforesaid, which execution was levied on certain property of said defendants, which said property was suffered to remain in the possession of said defendants, upon executing a forthcoming bond, according to law with Samuel C. Faulkner as security, which said bond was returned to our said circuit court, at the May term thereof, A. D. 1838 by the marshall aforesaid, "forfeited," and thereby has the force and effect of a judgment according to the statutes, in such cases made and provided as well as against the said sureties as against the defendants to said original execution for said debt, interest and costs.

Now therefore you are hereby commanded as oftentimes as before etc. that of the goods and chattels, lands and tenements of the said James McLaren, John C. I. Hammond, and Samuel C. Faulkner late of your district, you cause to be made the amount of said judgment, interest and costs, so recovered as aforesaid, also the sum of Three and 83/100 Dollars including the cost accrued since the emanation of said execution, and that you have the said sums of money be*fo*re our said Circuit Court at a term to be held on the 1st Monday of November next to render to said plaintiff, and have also then and there this writ.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States at Jackson, the 1st Monday of May A. D. 1837, and in the Sixty-third year of the Independence of the United States. Issued the 11th day of June, 1839.

[L. S.] WILLIAM BUMS, *Clerk.*

Endorsement: No security of any kind is to be taken. Wiliam Bums, Clerk.

This execution is entitled to a credit of Twelve Hundred Thirty nine dollars and Twenty-four cents, paid on the 6th day of May A. D. 1839.

78 See Marshal's return on Fi. fa. No. 633 to May term A. D. 1839.

WILLIAM BUMS, *Clerk.*

Marshal's Return.

Levied this execution together with others viz: Samuel Hildebum, Young, Smith & Company, Martin Pleasants & Company, R. H. Osgood & Company, Seaman & Ward, Graniss & Brothers against McLaren & Hammond and sureties on the following lands, viz: Lots No. 1, 2, 3, 4, 5, sec. 2, 6, 7, 8, Sec. 1 Tp 11, Range 8, west (MR.) South half of Section 33, North half of Section 28, South-west qr. Section 21 East half, N. E. qr, and East half S. E. qr, sec. 20, Tp 14, range 6 west (DC) Lots No. 2, 3, 5, 6, sec. 18, Tp 8, range 4 east. (Mad. Co.) Lot No. 3 sec. 21, tp 5, range 1, east (38 acres). The undivided one half of the whole section 21, east half, N. W. qr. and N. E. qr, S. E. qr., and east half, S. W. qr, sec. 20, tp 7, range 5, east. The whole of east half, N. E. qr, sec. 27, west half, N. W. qr, sec. 26, S. W. qr, sec. 23, & lot 7, sec. 22, tp 5, range 1, east; S. W. qr, sec. 9; lots 5, 6, sec. 8, tp 7, range 3, east. East half, N. W. qr, sec. 12, tp 5, range 2, east. Rankin.) East half, N. W. qr, sec. 32, west half, sec. 33; west half sec. 28; south half, sec 29; N. E. qr and east half, N. W. qr, sec. 29, all in tp 7, range 6, east.

The undivided interest of one half of the last described tracts, and after having duly advertised the said lands they were offered for sale in the city of Jackson, at the front door of the State house on the 7th day of October 1839; the defendants having consented in writing that said sale should take place in Jackson, when the first described tract; to-wit: 615 43/100 acres on the Mississippi River was knocked down to William C. Demoss at the price of $6,000.; the sec-nd and third tracts consisting of 961 48/100 acres on Deer Creek in Washington County, was struck off to William Bums at the price of $3800; the fourth tract consisted of 319 80/100 acres in Madison County was struck off to Charles M. McLaren at the price of $300., and the 5th consisting of defendant's interest in Lot No 3,
79 sec. 12, tp 5, range 1, east, near Jackson, was struck off to James Roach for the sum of $340, and all the balance was sold to Charles Mclaren for $1435; the said Demoss, Roach and McLaren being respectively the highest last and best bidders for this execution, together with others mentioned above were also levied on the following described tracts of land, to-wit: Sections 35 and 36 in tp. 7, S. R. 11, West, and fractional sections 1, 2, 3, 8, 9, 10, in tp. 8, S. R. 11, West, all lying on or near the sea-shore in the vicinity of Mississippi, which said lands after having been duly advertised were sold in Jackson on the 28th day of October, A. D. 1839 to John Martin for the sum of $760, he being the highest best and last bidder.

WM. M. GWIN, *Marshal,*
Per F. S. HUNT.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Circuit Court of the United States.

I, William H. Brown, Clerk of said court, do hereby certify that the foregoing contains a true and correct copy of the judgment rendered in the case above stated and also of the execution issued in the said case to the November Term, 1839, of said Court together with the indorsement, marshal's return thereon, as the same now remains of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said Court at Jackson, this the 8th day of March, A. D. 1848.

[SEAL.] W. H. BROWN, *Clerk,*
Per CHARLES H. ROGERS, *D. C.*

80 EXHIBIT "B."

STATE OF MISSISSIPPI,
Harrison County:

Lis Pendens Notice.

To the people of Gulfport, Mississippi City, and vicinity, and all persons in any way interested:

You will please take notice that Ellen G. M. Rogers, a citizen of the City of Madison, County of Morris and State of New Jersey and William O. Rogers, Jr., a citizen of the City of New York and State of New York, John B. Martin of the County of Yazoo and State of Mississippi, Mrs. L. N. Brunswig, City of New Orleans State of Louisiana, former wife of A. Y. Rogers deceased, but now wife of Dr. L. N. Brunswig of New Orleans, State of Louisiana, Mrs. Roas Adele Martin Matthews, wife of George B. Matthews of the City of New Orleans and State of Louisiana, have filed their petition or bill against William Penn Martin and George Dwight Martin, and against all heirs claiming to be the heirs at law of John Martin, who died in the City of New Orleans in the year 1848, to establish their claim as the sole surviving heirs at law of the said John Martin who died intestate and was at the time of his death the owner and seized in fee of the following described lands, situated in the County of Harrison and State of Mississippi, more particularly described as follows, to-wit:

and these heirs of John Martin will claim all buildings and improvements hereafter and heretofore made in and upon said lands, and have asked to be put in possession of the same.

HARPER & HARPER,
Attorneys for Plaintiffs.

81 EXHIBIT "C."

For & in consideration of One Dollar the receipt of which is hereby acknowledged and other valuable considerations, I hereby sell, assign and quit claim and set over unto J. T. Jones of Buffalo, New York, all my right, title and interest in and to a certain contract bearing date November 8th A. D. 1895 relating to lands in Harrison County, State of Mississippi, Town of Gulfport, by and between John Bryant of Cohasset Massachusetts and myself, recorded in the Clerk's office of the County of Harrison State of Mississippi on the 27th day of January, 1896, in Book #33, page 430.

In witness whereof, I have hereunto set my hand and seal this 1st day of March A. D. 1901.

S. S. BULLIS. [SEAL.]

STATE OF NEW YORK,
County of Cattaraugus, ss:

Be it remembered on this the 24th day of March, A. D. 1902, before me the subscriber a notary public in and for said County personally appeared S. S. Bullis and in due form of law acknowledged the above indenture to be his act and deed, and desired the same might be recorded as such.

Witness my hand and notarial seal.

A. J. WILLIAMS,
Notary Public.

82 EXHIBIT "D."

STATE OF MISSISSIPPI,
County of Harrison:

In consideration of $1.00 (One Dollar) I convey and warrant unto A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, & John Clark, composing the Board of Supervisors of said County and to their successors in office, the following described lands situated in the town of Gulfport in said Harrison County, Mississippi, viz: Lots Nos. 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, & 34, in Block No. 130, according to the map or plat of said town of Gulfport, now of record in the Chancery Clerk's office at the Court House at Mississippi City in said County, for the use of said Harrison County, Mississippi, as a site for the Court House and other appurtenant buildings. And it is understood that whenever the Supervisors of the said County, or the said County at any time cease to use the said land for a Court House and Court purposes then the title thereto shall cease and revert to me and to my heirs and assigns.

Witness my signature this the 24th June, A. D. 1902.

(Signed) J. T. JONES.

STATE OF MISSISSIPPI,
County of Harrison:

Personally appeared before me, A. McAlpin, Notary Public in and for the Town of Gulfport in said County, the within named J. T. Jones who acknowledged and delivered the foregoing instrument as his act and deed on the day and year therein mentioned.

Given under my hand and seal affixed at my office, in said town of Gulfport, this the 24th day of June, A. D. 1902.

[SEAL.] A. McALPIN,
Notary Public.

83 STATE OF MISSISSIPPI,
Harrison County:

I hereby certify that this instrument was received and filed for record at 8 o'clock & — Minutes A. M. on the 5th day of Feb. A. D. 1903 and recorded in record of deeds vol. No. 54 on — p.

84 EXHIBIT "F."

In consideration of One Dollar, and other valuable considerations, to me paid by J. T. Jones of Buffalo, in the State of New York, a receipt whereof is hereby acknowledged, I, John Bryant, of Cohasset in the County of Norfolk, and Commonwealth of Massachusetts, hereby convey and warrant specially to the said Joseph T. Jones, his heirs and assigns, all my rights, title and interest in and to the lands and property in Harrison County, Mississippi, purchased by William M. Wheatley at a sale made by R. H. Winter, Commissioner, on the 11th of August, A. D. 1890, under final decree in the case of Heman Clark and others against the Union Investment Company, and others for more particular description, of which reference *his* hereby made to the deed executed by said Winter, Commissioner to William M. Wheatley, and presented with his report of sale of Circuit Court of the United States for the Southern Division of the Southern District of Mississippi, for confirmation.

Witness my Hand and Seal this twenty-fifth day of February, A. D. 1901.

JOHN BRYANT. [SEAL.]

$30.00 Cancelled I. R. Stamp.

SUFFOLK, *ss:*

COMMONWEALTH OF MASSACHUSETTS,
CITY OF BOSTON, *Feb.* 25, 1901.

Personally appeared before me, a Notary Public, within and for the County and Commonwealth aforesaid, John Bryant who acknowledged that he signed and delivered the foregoing instrument on the day and year therein named.

Given under my hand and seal of office the twenty-fifth day of February, 1901.

[SEAL.] CHARLES C. READ,
Notary Public.

85

Filing	.05
200 wds.	.20
Certificate	.50
	$ .75

This instrument of which the foregoing is a record*ed* was delivered to me to be recorded, 8 o'clock A. M., April 2, 1901, and recorded April 8th, 1901. Recorded in Book 47 pages 126-127 of the Harrison County Deed Records.

Filed by leave of the Court.

Dec. 13th, 1905.

F. S. HEWES, *Clerk*.

86 *Demurrer to Amended Bill.*

THE STATE OF MISSISSIPPI,
Harrison County:

In the Chancery Court of Harrison County, Mississippi.

No. —.

WILLIAM O. ROGERS, JR., ET AL.
vs.
JOSEPH T. JONES ET AL.

Now comes the defendant and demurs to the Amended bill of said complainants, and pray the judgment of the court if they shall make any further answer thereto, and assign the following causes of demurrer to said bill:

1st. That upon the facts alleged in the said bill and exhibits, the said John Martin did not, by virtue of the said alleged sale by the said United States Marshal, acquire either the legal or equitable title to said land.

2nd. That the said alleged sale by said Marshal on the 28th day of October 1839, in front of the State House in Jackson, was not made at a time or place fixed by law for making such sales and that the said sale to said John Martin was void, and carried neither title nor the right to title.

3rd. That the facts alleged in said bill do not warrant the legal conclusion that said complainants are heirs at law of said John Martin, or otherwise show that they, the complainants, have any right, title or interest in said lands.

4th. That said bill is a bill seeking to divest the legal title out of the said heirs at law, devisees or legal representatives of said James McLaren, deceased, but does not make such heirs at law, devisees or legal representatives, parties to this suit, and therefore there is a non-rejoinder of proper parties.

5th. That whatever rights or interest the said complainants or

their alleged ancestor, John Martin, acquired under said alleged Marshall's sale, is now barred by the ten years' statute of limitations.

6th. That the alleged fraudulent concealment that has for half a century, kept complainants in the dark as to their rights, is not alleged to have been the act of the defendant, or of any person in privity with him.

7th. That there is no allegation that any facts in relation
87 to the claim of said complainants as heirs of said John Martin were concealed from complainants by defendants or their privies.

8th. That the bill fails to allege or show that complainants exercised any reasonable diligence to discover the facts in reference to their alleged claim, or that they could not, by the exercise of reasonable diligence have discovered the facts constituting the alleged fraudulent concealment within ten years before the institution of said suit.

9th. Because the exhibits referred to in said bill, and attached to said bill, and the allegations contained in said bill are contradictory.

10th. Because there is no equity on the face of said bill.

BOWERS, NEVILLE & GRIFFITH, &
FORD & WHITE, &
W. G. EVANS,
Solicitors for Defendants.

I hereby certify that in my opinion the above demurrer is well taken and that it should be sustained.

JAS. H. NEVILLE, *Solicitor.*

Filed December 20, 1905.
F. S. HEWES, *Clerk,*
By JNO. J. MURPHY, *D. C.*

Refiled Dec. 23rd, 1905.
F. S. HEWES, *Clerk.*

Order to Set Down.

1667.

W. O. ROGERS ET AL.
v.
J. T. JONES ET AL.

The Clerk will set this Cause down on Demurrer, to amended answer of complainant's bill.

WHITE & FORD,
BOWERS, NEVILLE & GRIFFITH, &
W. G. EVANS,
Sol's for Def't.

Filed Dec. 20th, 1905.
F. S. HEWES, *Clerk,*
By JNO. J. MURPHY, *D. C.*

Motion.

1667.

ROGERS ET AL.
v.
JONES ET AL.

88 Comes the Defendant and moves the Court to allow them to withdraw the Demurrer filed herein to the Amended Bill.

FORD & WHITE, &
BOWERS, NEVILLE & GRIFFITH, &
W. G. EVANS,
Sols. for Def'ts.

Filed this 20 day of Dec. 1905.
F. S. HEWES, *Clerk.*

Order Allowing Defendant to Withdraw Demurrer.

1667.

ROGERS ET AL.
v.
JONES ET AL.

It is ordered adjudged and decreed that Defendants have leave to withdraw the demurrer filed herein to Complainant's amended bill of complaint.

J. O. SANDERS,
Special Chancellor.

File Dec. 20, 1905.
F. S. HEWES, *Clerk.*
By JNO. J. MURPHY, *D. C.*

Answer Denying Fraud.

THE STATE OF MISSISSIPPI,
Harrison County:

In Chancery Court, Special December Term, A. D. 1905.

WILLIAM O. ROGERS, JR., ET AL.
vs.
JOSEPH T. JONES ET AL.

Now comes Harrison County by its Board of Supervisors one of the defendants in said bill, and answering said bill of complaint, or so much and such parts thereof as it advised is necessary to make answer unto for the purpose of denying the allegations of fraud therein contained, defendant says:

They deny that they had any knowledge of any claim of title upon said lands held by the said complainants; and deny that they had any notice of fraud practiced by the said J. J. McCaughan and his coadjutors, or any one else, upon said complainants; and deny that they knew of any facts in relation to the title of said land which would constitute a fraud upon complainants; and deny that the action of said Board in accepting said deed of gift was for
89 the purpose of hindering, delaying or defrauding the complainants, or any of them; and denies that any acts of these defendants in relation to said land has in any way hindered, delayed or defrauded the said complainants or any of them.

And now having answered said bill for the purpose of denying the fraud therein charged, said defendants pray the judgment of the court on the demurrer herewith filed.

W. G. EVANS,
FORD & WHITE,
BOWERS, NEVILLE & GRIFFITH.

THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for said State and County, John Scarborough, Prest. Bd. of Supervisors of Harrison County, Miss. who being sworn says that he is Prest. Bd. Supervisors of Harrison County the above named, and that the allegations and matters contained in the above and foregoing answer are true as therein stated.

JOHN SCARBOROUGH, *President.*

Sworn and subscribed before me this 22nd day of December, A. D. 1905.

F. S. HEWES,
Clerk Chancery Court,
By JNO. J. MURPHY, *D. C.*

Filed this 21 day of Dec. 1905.
F. S. HEWES, *Clerk.*

Refiled this 23rd day of Dec. 1905.
F. S. HEWES, *Clerk.*

Motion.

1667.

W. O. ROGERS, JR., ET AL.
v.
J. T. JONES & HARRISON COUNTY ET AL.

And now comes the Complainant and move to set aside the final decree in this case, because the same is in contravention of the laws & Constitution of the United States, and they makes like Motion to

predicate an appeal to the Supreme Court of the United States in case the Federal question here involved is decided against them by the Supreme Court of this state.

HARPER & HARPER,
Sols. for Motion.

90 Filed Dec. 22, 1905.

F. S. HEWES, *Clerk,*
By JNO. J. MURPHY, *D. C.*

Demurrer to Amended Bill.

THE STATE OF MISSISSIPPI,
Harrison County:

In the Chancery Court of Harrison County, Mississippi.

No. —.

WILLIAM O. ROGERS, JR., ET AL.
vs.
JOSEPH T. JONES ET AL.

Now comes the defendant and demurs to the Amended Bill of said complainants, and pray the judgment of the court if they shall make any further answer thereto, and assign the following causes of demurrer to said bill:

1st. That upon the facts alleged in the said bill and exhibits, the said John Martin did not, by virtue of the said alleged sale by the said United States Marshal, acquire either the legal or equitable title to said land.

2nd. That the said alleged sale by said Marshal on the 28th day of October 1839, in front of the State House in Jackson, was not made at a time or place fixed by law for making such sales and that the said sale to said John Martin was void, and carried neither title nor the right to title.

3rd. That the facts alleged in said bill do not warrant the legal conclusion that said complainants are heirs at law of said John Martin or otherwise show that they, the complainants, have any right, title, or interest in said lands.

4th. That said bill is a bill seeking to divest the legal title out of the said heirs at law, devisees or legal representatives of said James McLaren, deceased, but does not make such heirs at law, devisees or legal representatives, parties to this suit, and therefore there is a non-rejoinder of proper parties.

5th. That whatever rights or interest the said complainants or their alleged ancestor, John Martin, acquired under said alleged Marshal's sale, is now barred by the ten years' statute of limitations.

6th. That the alleged fraudulent concealment that has for half a century, kept complainants in the dark as to their rights, is not

alleged to have been the act of the defendant, or of any person
91 in privity with him.

7th. That there is no allegation that any facts in relation to the claim of said complainants as heirs of said John Martin were concealed from complainants by defendants or their privies.

8th. That the bill fails to allege or show that complainants exercised any reasonable diligence to discover the facts in reference to their alleged claim, or that they could not, by the exercise of reasonable diligence have discovered the fact constituting the alleged fraudulent concealment within ten years before the institution of said suit.

9th. Because the exhibits referred to in said bill, and attached to said bill, and the allegations contained in said bill are contradictory.

10th. Because there is no equity on the face of said bill.

BOWERS, NEVILLE & GRIFFITH, &
FORD & WHITE, &
W. G. EVANS,
Solicitors for Defendants.

I hereby certify that in my opinion the above demurrer is well taken and that it should be sustained.

JAS. H. NEVILLE,
Solicitor.

Filed December 20, 1905.
F. S. HEWES, *Clerk.*
By JNO. J. MURPHY, *D. C.*

Refiled Dec. 23rd, 1905.
F. S. HEWES, *Clerk.*

Answer Denying Fraud.

THE STATE OF MISSISSIPPI,
Harrison County:

In Chancery Court, Special December Term, A. D. 1905.

WILLIAM O. ROGERS, JR., ET AL.
vs.
JOSEPH T. JONES ET AL.

Now comes Harrison County by its Board of Supervisors one of the defendants in said bill, and answering said bill of complaint, or so much and such parts thereof as it — advised is necessary to make answer unto for the purpose of denying the allegations of fraud therein contained, defendant says:

They deny that they had any knowledge of any claim of
92 title upon said lands held by the said complainants; and deny that they had any notice of fraud practiced by the said J. J. McCaughan and his coadjutors, or any one else, upon said

complainants; and deny that they knew of any facts in relation to the title of said land which would constitute a fraud upon complainants; and deny that the action of said Board in accepting said deed of gift was for the purpose of hindering, delaying or defrauding the complainants, or any of them; and denies that any acts of these defendants in relation to said land has in any way hindered, delayed or defrauded the said complainants or any of them. And now having answered said bill for the purpose of denying the fraud therein charged, said defendants pray the judgment of the court on the demurrer herewith filed.

W. G. EVANS,
FORD & WHITE,
BOWERS, NEVILLE & GRIFFITH.

THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for said State and County, John Scarborough, Prest. Bd. of Supervisors of Harrison County, Miss. who being sworn says that he is Prest. Bd. of Supervisors of Harrison County the above named, and that the allegations and matters contained in the above and foregoing answer are true as therein stated.

JOHN SCARBOROUGH, *President.*

Sworn and subscribed before me this 22nd day of December, A. D. 1905.

F. S. HEWES,
Clerk Chancery Court.
By JNO. J. MURPHY, *D. C.*

Filed this 21 day of Dec. 1905.
F. S. HEWES, *Clerk.*

Refiled this 23rd Dec. 1905.
F. S. HEWES, *Clerk.*

Answer of J. T. Jones for the Purpose of Denying Fraud.

THE STATE OF MISSISSIPPI,
Harrison County:

In Chancery Court, Special December Term, A. D. 1905.

WILLIAM O. ROGERS, JR., ET AL.
vs.
JOSEPH T. JONES ET AL.

93 Now comes J. T. Jones, one of the defendants in said bill, and answering said bill of complaint, or so much and such parts thereof as he is advised is necessary to make answer to for the

purpose of denying the allegations of fraud therein contained, defendant says;

He denies that he had any knowledge of any claim of title upon said lands held by the said complainants; and deny that he had any notice of fraud practiced by the said J. J. McCaughan and his coadjutors, or anyone else, upon said complainants; and deny that he knew of any facts in relation to the title of said land which would constitute a fraud upon complainants; and denies that any acts of this defendant in relation to said land has in any way hindered, delayed, or defrauded the said complainants or any of them.

And now having answered said bill for the purpose of denying the fraud therein charged, said defendant prays the judgment of the court on the demurrer herewith filed.

J. T. JONES.

THE STATE OF MISSISSIPPI,
Harrison County, City of Gulfport:

Personally appeared before me the undersigned authority in and for City, County, and State, Joseph T. Jones, who being sworn says that the allegations and matters contained in the above and foregoing answer are true as therein stated.

J. T. JONES.

Subscribed and sworn to before me this 21st day of December, A. D. 1905.

[SEAL.] J. L. BARTON,
Notary Public.

Filed this 23rd day of Dec. 1905.
F. S. HEWES, *Clerk.*

Order to Set Down.

No. 1667.

ROGERS ET AL.
vs.
JONES ET AL.

The Clerk will set down this Cause on Answer of Board of Supervisors and J. T. Jones denying fraud and the demurrer to the amended bill of complaint filed herein.

W. G. EVANS, &
FORD & WHITE &
BOWERS, NEVILLE & GRIFFITH,
Sol. for Def'ts.

94 Filed this 23 day of Dec. 1905.
F. S. HEWES, *Clerk.*

Final Decree.

THE STATE OF MISSISSIPPI,
Harrison County:

In the Chancery Court.

No. 1667.

W. O. ROGERS ET AL.
vs.
J. T. JONES ET AL.

This cause coming on to be heard on the demurrer of the defendants to the bill of complaint, and the court having heard the arguments of counsel and being advised in the premises, and being of the opinion that said demurrer is well taken, it is thereupon ordered that said demurrer be and the same is hereby sustained; and the complainants in open court declining and refusing to plead further, it is thereupon ordered that said bill be and hereby is dismissed at the costs of the complainant to be taxed by the Clerk for which let proper process issue.

Ordered, adjudged and decreed this the 23 day of December, A. D. 1905.

J. O. S. SANDERS,
Special Chancellor.

Filed Dec. 23rd, 1905.

F. S. HEWES, *Clerk,*
By JNO. J. MURPHY, *D. C.*

Order Overruling Motion for New Trial.

1667.

W. O. ROGERS, JR., ET AL.,
vs.
J. T. JONES ET AL.

The Motion for a new trial coming on to be heard, it is ordered by the Chancellor that said Motion be and the same is hereby overruled, Ordered, adjudged and decreed this the 23rd day of Dec. 1905.

J. O. S. SANDERS,
Special Chancellor.

Filed Dec. 23rd, 1905.

F. S. HEWES, *Clerk,*
By JNO. J. MURPHY, *D. C.*

Bill of Exceptions.

95 THE STATE OF MISSISSIPPI,
Harrison County:

Chancery Court, Dec. Term, 1905.

W. O. ROGERS ET AL., Complainant-,
vs.
J. T. JONES, HARRISON COUNTY, ET AL., Def't-.

Be it remembered that this cause coming on to be heard on *to* motion for a new trial & to set aside the judgment for reasons stated in said motion, the same was by the Court over-ruled and to the overruling of which the Complainants then & there objected and tendered their Bill of Exceptions and asked that the same might be signed and made a part of the record in this cause & which was accordingly done this the 23rd day of Dec. A. D. 1905.

J. O. SANDERS,
Special Chancellor.

Filed this 23 day of Dec. 1905.
F. S. HEWES, *Clerk.*

Petition for Appeal.

STATE OF MISSISSIPPI,
Harrison County:

Chancery Court, January Term, A. D. 1906.

WILLIAM O. ROGERS ET AL.
vs.
J. T. JONES ET AL.

Your petitioners, Miss Ellen G. M. Rogers, William O. Rogers, John B. Martin, Mrs. L. N. Brunswig, wife of L. N. Brunswig, and Mrs. Roas Adele Matthews, heirs at law of John Martin, do respectfully represent unto your honor, that on or about the — day of ——, A. D. 1906, a decree was rendered in the Chancery Court of Harrison County, by J. O. Sanders, special Chancellor, in favor of J. T. Jones, *et al.*, the defendants, dismissing complainant's bill and adjudging the costs of the suit against your petitioners. They respectfully pray that an appeal may be granted to them to the next term of the Supreme Court of the State of Mississippi, to be heard at Jackson, Mississippi, on the first Monday of April, A. D. 1906, so that the errors in said decree, if any, may be reviewed, revised and corrected by the appellate tribunal.

Your petitioners further represent that they claim the aforesaid

land under and by virtue of a sale, by the United States
95½ Marshal, at Jackson, Mississippi, under an Act of Congress of the United States, under an execution issued on judgments in the Circuit Court of the United States, as shown by the pleadings in this cause, and they ask specifically, that the court pass upon this federal question, and in the event it is decided adversely to them, they pray that they may be granted an appeal to the Supreme Court of the United States from this decision made under the laws and Constitution of the United States.

W. O. ROGERS, JR.,
ELLEN G. M. ROGERS,
JOHN B. MARTIN,
MRS. L. N. BRUNSWIG,
MRS. ROSA ADELE MATTHEWS,
By HARPER & HARPER, *Attorneys.*

To F. S. Hewes, Chancery Clerk of Harrison County, Mississippi.

BILOXI, MISS., *Feb.* 26, 1906.

Mr. F. S. Hewes, Chancery Clerk.

DEAR SIR: I send you check for $100 in lieu of an appeal bond and also in same check for amount to be filled by you in proper sum to cover the cost of transcript of the record to be made out in accordance with 75 Annotated Code 1892.

You will therefore only make out the transcript of the proceedings had on the Amended Bill of Complaint as the other parts are already with Supreme Court, and file this with the petition for an appeal as a part thereof & will be your authority for so doing in case of W. O. Rogers *et al. vs.* J. T. Jones, *et al.*

With respect, HARPER & HARPER,
Attorneys for Appellant.

Filed this 1st day of March, 1906.
F. S. HEWES, *Clerk.*

96 THE STATE OF MISSISSIPPI,
Harrison County:

I, F. S. Hewes, Clerk of the Chancery Court of said County and State hereby certify that the foregoing 60 pages contain a true, correct and complete transcript of all the pleadings, evidence, and orders had subsequent to former appeal and Decree appealed from in the case of W. O. Rogers *Hr. et al.* Complainants, *v.* J. T. Jones, *et al.*, Defendants, No. 1667 of said Court, as the same remain on file and of record in my office.

Given under my hand and seal of said Court at Gulfport, Mississippi, this the 10th day of March A. D. 1906.

(Signed) F. S. HEWES, *Clerk.*

I certify that the sum of $100 has been deposited with the undersigned in lieu of bond for appeal.

(Signed) F. S. HEWES, *Clerk.*

Statement of Fee for Transcript.

Fee for transcript; Summons; service and binding fee $22.40 which has been paid.

(Signed) F. S. HEWES, *Clerk.*

97 *Summons to Supreme Court from Chancery Court.*

Secs. 73, 3413, & 4342, Annotated Code, 1892.

The State of Mississippi to the Sheriff of Harrison County, in said State:

You are hereby commanded to summon Joseph T. Jones and the County of Harrison, State of Mississippi, and A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington, & J. B. Clark individuals and members constituting the Board of Supervisors of the County of Harrison, Miss.; Bowers, Neville & Griffith, Ford & White & W. G. Evans, Appellees or their attorneys in fact or of record, if to be found in your County, to appear before the Supreme Court of the State of Mississippi at the Capitol in the city of Jackson, in the County of Hinds, and State aforesaid, on the 2nd day of April, A. D. 1906, then and there to answer the appeal of W. O. Rogers, Jr., Ellen G. M. Rogers, John B. Martin, Mrs. L. N. Brunswig, Mrs. Rosa Adele Matthews, from a decree of the Chancery Court of the County of Harrison, in said State, rendered against said Appellant on the 23rd day of December, A. D. 1905, at the Special December Term, A. D. 1905, of said Chancery Court, in favor of Appellees, sustaining demurrer to amended bill and dismissing said bill in the case of W. O. Rogers, Jr., *et al.* Complainants, *v.* J. T. Jones, *et al.* Defendants, No. 1667 of said Court, and have there then this writ.

Given under my hand and the seal of said Chancery Court, at my office in Gulfport, Miss., and issued this the 1st day of March, A. D. 1906.

F. S. HEWES,
Chancery Clerk.
By —— ——, *D. C.*

98 *Final Decree.*

Supreme Court of Mississippi, October Term, 1906.

MONDAY, *Oct. 22nd*, 1906.

No. 12112.

W. O. ROGERS ET AL.
vs.
J. T. JONES ET AL.

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Harrison County and

this Court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order adjudge and decree that the decree of said Chancery Court rendered in this cause at the December Term 1905 on Dec. 23rd A. D. 1905, be and the same is hereby affirmed by this Court; and that the appellees do have and recover of the appellants the costs of this cause in this Court and in the Court below to be taxed etc.

99 The Supreme Court of the State of Mississippi.

No. 12112.

W. O. ROGERS ET AL., Complainants,
vs.
J. T. JONES ET AL., Defendants.

Petition for a Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Mississippi in rendering judgment against them in the above entitled case, the complainants hereby pray a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

FRANK JOHNSTON,
Solicitor for the Complainants.

THE STATE OF MISSISSIPPI,
Supreme Court, ss:

Let the writ of error issue upon execution of a bond by the Complainants to the Defendants in the sum of One Thousand Dollars, which bond when approved to act as a supersedeas.
Sept. 18th, 1907.

A. H. WHITFIELD,
Chief Justice of the Supreme Court of Mississippi.

100 The Supreme Court of the State of Mississippi.

On Writ of Error from the Supreme Court of the United States.

W. O. ROGERS ET AL.
vs.
J. T. JONES ET AL.

Assignment of Errors.

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the complainants hereby pray a writ of error from said decision and judgment to the United States Supreme Court, and an

order fixing the amount of a supersedeas bond. And the said complainants assign the following errors in the records and proceedings of said case.

The Supreme Court of the State of Mississippi erred in holding that the judicial sales made by the United States Marshall under judgments rendered by the United States Circuit Court for the Southern District of Mississippi, of the lands in controversy, and under which the complainants claim title to the land in controversy were and are irregular and illegal and conferred no title upon the purchaser at said sales, and under whom the complainants claim title to the lands in controversy. Said sales, as to time place and all particulars relating thereto are set up with minuteness and particularity in the complainants' Bill and Amended Bill in this case. And which pleadings are now referred to particularly.

One of said sales was made on October 28th 1839 at Jackson, Mississippi, in front of the door of the State House where the said United State Court was held in the case of Wanzer and Harrison *vs.* McLaren and Hammond *et al.*

The other sale was made on October 7th 1839 at the same place under executions issued under the same judgment.

These sales were made under the authority of the Federal Court, and under the Act of Congress of May 19th 1828, and Feb'y 16th, 1838, and of the General Judiciary Acts of Congress regulat-
101 ing the jurisdiction and forms and modes of procedure in the Federal Courts.

This claim of title made by the complainants is under this Federal authority, and it has been wrongfully denied them by the Supreme Court of the State of Mississippi. The decision should have been in favor of the claim under Federal authority made by the complainants, as the decision should have upheld these judicial sales.

For which errors the complainants pray that the said judgment of the Supreme Court of the State of Mississippi made Oct. 22nd, 1906, be reversed and a judgment rendered in favor of the complainants and for costs.

FRANK JOHNSTON,
Solicitor for the Complainants.

102 W. O. ROGERS ET AL.
vs.
J. T. JONES ET AL.

Writ of Error Bond.

Know all men by these presents that we W. O. Rogers Jr. of New York, Ellen G. M. Rogers of New Jersey, John B. Martin of Mississippi, Mrs. Rosa Adele Martin Matthews, wife of George B. Matthews, Mrs. L. N. Brunswig, wife of L. N. Brunswig of New Orleans, Louisiana, as principals and E. Elerman and I. Heidenheim as sureties, are held and firmly bound unto Joseph T. Jones, The County of Harrison, and A. J. Bond, U. Desporte, John Scarborough, W. E. Whittington and J. B. Clark as individuals and as members of the

Board of Supervisors of Harrison County and State of Mississippi, all residents of Harrison County, in the sum of One Thousand Dollars to be paid to the obligees named herein, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents. Sealed with our seals and dated this the — day of ——, 1907.

Whereas, the above bound Plaintiffs in error seek to prosecute their writ of error to the U. S. Supreme Court to reverse the judgment or decree rendered in above entitled equity suit by the Supreme Court of the State of Mississippi, on October 22nd, 1906.

Now therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute this said writ of error to effect, and answer all costs and damages that may be adjudged if they shall fail to make good its plea, then this obligation to be void otherwise to remain in full force and effect.

W. O. ROGERS JR.
MRS. A. L. MERRIAM,
(*Formerly Ellen Galt Martin Rogers.*)
MRS. L. N. BRUNSWIG,
(Per MRS. A. L. MERRIAM, *Att'y.*)
ROSA ADELE MARTIN MATTHEWS.
JOHN B. MARTIN.
E. ELERNMAN.
I. HEIDENHEIM.

103 THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me one of the sureties in the foregoing bond who being by me first duly sworn, said on oath he is of lawful age, and is a citizen of the State of Mississippi, and knows the contents of the foregoing instrument to which he has attached his name, and that he is worth the sum of One Thousand Dollars in visible property in the State of Mississippi over and above all debts, liabilities and exemptions.

E. ELERMAN.

Sworn to and subscribed before me this the 7th day of August, 1907.

[SEAL.] A. B. AUSTIN,
Notary Public.

THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me I. Heidenheim one of the sureties in the foregoing bond who being by me first duly sworn said on oath he is of lawful age, and is a citizen of the State of Mississippi and knows the contents of the foregoing instrument to which he has attached his name, and that he is worth the sum of One Thousand Dollars in visible property in the State of Mississippi, over and above all debts, liabilities and exemptions.

I. HEIDENHEIM.

Sworn to and subscribed before me this the 7th day of August, 1907.

[SEAL.] A. B. AUSTIN,
Notary Public.

Bond approved this the 18th day of September, 1907, to operate as a supersedeas.

A. H. WHITFIELD,
Chief Justice of the Supreme Court of Mississippi.

Attest:
GEO. C. MYERS,
Clerk of the Supreme Court of Mississippi.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said court before you, or some of you, being the highest court of law and equity of said State in which a *a* decision could be had in the said suit between W. O. Rogers *et al.* and J. T. Jones *et al.* wherein was drawn in question the validity of certain execution sales under a judgment or judgments of the United States Circuit Court for the Southern District of Mississippi under which the complainants claim title to the lands in controversy, and which decision was against the validity of the claim thus set up under the acts of Congress and of the Federal authority exercised by the said Federal court, and thus against the claim made under Federal authority; a manifest error hath happened to the great damage of the complainants as by them complainant- appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done, we command you, if judgment therein given, that then under your seal you send the record and proceedings aforesaid with all things concerning
105 the same to the Supreme Court of the United States at Washington, within thirty days, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the said record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of September, 1907.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

L. B. MOSELEY,
Clerk of the Circuit Court of the United States for the Southern District of Mississippi.

Allowed Sept. 18/07.
A. H. WHITFIELD,
Chief Justice of the Supreme Court of the State of Mississippi.

[Endorsed:] No. 12,112. W. O. Rodgers *et al. vs.* J. T. Jones *et al.* Writ of Error.

106 STATE OF MISSISSIPPI,
Hinds County, ss:

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, do hereby certify that there was lodged with me on September 18th, 1907, in the matter of W. O. Rogers Jr. *et al. vs.* Joseph T. Jones *et al.*

1. The original appeal bond of which a copy is herein set forth.

2. Five copi*e* of the writ of error, as herein set forth—one for each defendant, and to file in my office.

In testimony whereof I have hereunto set my hand, and affixed the seal of said Court at my office, in the City of Jackson, Miss., this October 1st A. D. 1907.

[Seal State of Mississippi Supreme Court.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

STATE OF MISSISSIPPI,
Hinds County, ss:

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of W. O. Rogers *et al. vs.* Joseph T. Jones *et al.* and also of the final decree, and the opinion of the Supreme Court of Mississippi rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Jackson, Miss., this the 1st day of October A. D. 1907.

[Seal State of Mississippi Supreme Court.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

STATE OF MISSISSIPPI,
Supreme Court:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof I hereunto subscribe my name, and affix the seal of said Supreme Court of Mississippi, in the City of Jackson, this the 1st day of October A. D. 1907.

[Seal State of Mississippi Supreme Court.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

107 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph T. Jones, The County of Harrison, State of Mississippi, and A. J. Bond, U. Desporte, John Scarborough, *as* W. E. Whittington and J. B. Clark as individuals, and as members of the Board of Supervisors of the County of Harrison, State of Mississippi, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Mississippi, wherein W. O. Rogers *et al.* are complainants and plaintiffs in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Mississippi this the 18th day of September, 1907.

A. H. WHITFIELD,
Chief Justice of the Supreme Court of the State of Mississippi.

[Seal State of Mississippi Supreme Court.]

Attest:
GEO. C. MYERS,
Clerk of the Supreme Court of the State of Mississippi.

108 I hereby authorize and empower J. C. Rass, of the county of Harrison, State of Mississippi, to serve and execute the foregoing writ of citation upon the defendants in error therein named.

This the 18th day of September, 1907.

A. H. WHITFIELD,
Chief Justice of the Supreme Court of the State of Mississippi.

109 [Endorsed:] No. 12,112. W. O. Rogers *et al. vs.* J. T. Jones *et al.* Citation on Writ of Error.

THE STATE OF MISSISSIPPI,
Harrison County, ss:

Rec. by me this the 26th day of Sept., 1907.

J. C. RASS.

110 I have this day executed the within Citation, or notice, personally by delivering to Joseph T. Jones, Defendant, a true copy of this Citation this the 27th day of September A. D. 1907.

J. C. RASS.

I have this day executed the within Citation personally, by delivering to the within named Defendant U. Desport, as an individual and as a member of the Board of Supervisor-, a true copy of this Citation.

This the 28th day of September A. D. 1907.

J. C. RASS.

I have this day executed the within notice or Citation personally, by delivering to the within named Defendant W. E. Whittington, a true Copy of this Citation both as an individual and a member of the Board of Supervisors of Harrison County, Miss. This the 3rd day of October A. D. 1907.

F. SEAL, *Sheriff*,
By J. C. RASS.

I have this day executed the within writ personally, by delivering to the within named defendant John B. Clark, as — individual and as a member of the Board of Supervisors of the County of Harrison, State of Mississippi, a true copy of this writ. This the 5th day of October A. D. 1907.

J. C. RASS.

I hav- this day executed the withi- notice personally by delivering to John Scarborough Defendant a true copy of this writ as an individual and as a member of the Board of Supervisors of Harrison County, Miss.

This the 7th day of Octobe- A. D. 1907.

J. C. RASS.

The within named A. J. Bond is dead and has been for several years.

J. C. RASS.

Executeing 9 coppies @ $1.50 each	$13.50
Railroad fair	2.00
Hack hire	3.00
	$18.50

111 THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me J. C. Rass, who being by me duly sworn says on oath that he served the citation on the writ of error in the case of Rogers *et al. vs.* Jones on the Defendants in Error as recited and stated in my return on the said citation. Said cause being a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Mississippi.

J. C. RASS.

Sworn to and subscribed before me this the 16th day of October, 1907.

[Seal Chan. Court of Harrison County, Mississippi.]

F. S. HEWES,
Clerk Chancery Court, Harrison County, Mississippi.

[Endorsed:] 490, 20,893, Oct 26/07. Rogers *et al. vs.* Jones *et al.* Affidavit to return on citation.

Endorsed on cover: File No. 20,893. Mississippi supreme court. Term No. 196. W. O. Rogers, Jr., Ellen G. M. Rogers, John B. Martin *et al.*, plaintiffs in error, *vs.* Joseph T. Jones, The County of Harrison *et al.* Filed October 24th, 1907. File No. 20,893.

Supreme Court, U. S.
FILED
APR 5 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

NO. 196.

W. O. ROGERS, Jr., ELLEN G. M. ROGERS, JOHN B. MARTIN, et al.,
Plaintiffs in Error,
vs.
JOSEPH T. JONES, THE COUNTY OF HARRISON, et al.,
Defendants in Error.

In Error to the Supreme Court of the State of Mississippi.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

FRANK JOHNSTON,
Counsel for Plaintiffs in Error.

A. Y. HARPER,
Of Counsel.

(20,893)

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

NO. 196.

W. O. ROGERS, Jr., ELLEN G. M. ROGERS, JOHN B. MARTIN, et al., *Plaintiffs in Error,* *vs.* JOSEPH T. JONES, THE COUNTY OF HARRISON, et al., *Defendants in Error.*	In Error to the Supreme Court of the State of Mississippi.

STATEMENT.

I.

FORM OF THE ACTION.

This is a bill in equity brought by the Plaintiffs in Error in the State Court of Mississippi to remove certain clouds from their title to lands situated in Harrison County, Mississippi, and to be put in possession of said lands.

The precise prayer of the bill is as follows (Trans., 45, 46):

> "That upon final hearing the said deed of conveyance from the said J. T. Jones in and to the

aforesaid parcel of land lying in the town of Gulfport, County of Harrison, and State of Mississippi, to these defendants who are members of the Board of Supervisors of Harrison County, Mississippi, to a deed or contract from S. S. Bullis, bearing date March 1, 1902, and also a contract bearing date November 8, 1893, or '95, wherein S. S. Bullis quit-claimed unto J. T. Jones all of his right, title and interest in and to this contract relating to lands in Harrison County, Mississippi, made by and between John Bryant and the said defendant, J. T. Jones, recorded in the office of the Chancery Clerk in the town of Gulfport, County of Harrison, and State of Mississippi, on the 27th day of January, A. D. 1896, in book 33, page 432, a copy of which is herewith filed, marked exhibit "C," and made a part of this bill; and that these deeds and contracts may be set aside and declared void as to these lands involved in this suit and situated in the town of Gulfport, County of Harrison, and State of Mississippi, and that the clerk of this court be required to make cancellation upon the margin of the record of deeds as far as these lands are concerned; that all the buildings of the court house and the appurtenances thereto which are incident to the freehold be declared forfeited and condemned as to these defendants, and declared to be the lawful property of your orators, and that all improvements and additions that may be hereafter made be likewise declared forfeited, and that a reasonable rent from the date of acceptance of said lands and court house, be decreed against the County of Harrison, and against each and all of the said board of supervisors, namely, A. J. Bond, U. Desporte, W. E. Whittington, John Scarborough, and J. B. Clark, and that the clerk of said court be appointed a commissioner to state the [account] and be required to make a *lis pendens* notice of this proceeding as required by law; that your orators may have all such other and further and general relief, including a writ of error, to be

put in possession of said premises as equity may require, and to your Honor may seem meet."

II.

THE PLEADINGS.

The pleadings of the plaintiffs in error consist of an Original and an Amended Bill of Complaint; and the pleadings of the defendants in error comprise a Demurrer only to the Original Bill, and a Demurrer to the Amended Bill accompanied by an Answer denying that part of the Amended Bill alleging concealed fraud. There were two hearings and two appeals. The first hearing was had before the Chancellor on the demurrer to the Original Bill, and the demurrer was *overruled*. (Trans., 19.) An appeal was prayed from this judgment to the Supreme Court of Mississippi, and the judgment of the lower court was reversed and the cause remanded with a written opinion. (Trans., 23.) Thereupon, after leave given to amend, the plaintiffs in error filed an Amended Bill. To the Amended Bill, the defendants in error filed an answer denying the allegations of concealed fraud, and also demurred to the bill. On the hearing of the Amended Bill and the answer and demurrer, the Chancellor sustained the demurrer; and the plaintiffs in error refusing to amend or plead further, the Amended Bill was dismissed. (Trans., 61.) From this judgment the plaintiffs in error appealed to the Supreme Court, where the judgment of the Chancellor was affirmed *without an opinion*. (Trans., 64 and 65.) And from this judgment the plaintiffs in error prosecuted this writ of error.

We do not think it necessary to state the substance of the Original Bill at present, but later on in the Argument we shall indicate wherein it was materially amended to conform to the written opinion of the Supreme Court on the first appeal. The grounds of the demurrer to the Original Bill were substantially the same as those of the demurrer to the Amended Bill, which will be stated later.

The material averments of the Amended Bill are substantially as follows (Trans., 37 to 46):

The plaintiffs in error claim title to certain lands described in the bill, by virtue of a purchase of said lands by their ancestor, John Martin, at a sale of said lands on the 28th day of October, 1839, made by the United States marshal, under an execution, on a judgment of the United States Circuit Court of the Southern District of Mississippi, against one, James McLaren.

The plaintiffs in error allege that they are the "legal descendants and the sole surviving heirs at law of John Martin, deceased, who died intestate in the City of New Orleans, and State of Louisiana, during the year 1848;" they further represent that the said John Martin, their ancestor, at the time of his death, was seized and possessed of, in fee simple, in addition to other lands, the following described lands or parcels of lands, which include the lands in controversy, situated in the town of Gulfport, County of Harrison (Hancock County, at the time of the sale), and State of Mississippi, namely: Lots No. 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, Block 180, in the town of Gulfport, according to a map or plat of the said town of

Gulfport, as appears in the chancery clerk's office at Gulfport, Mississippi, in said County of Harrison.

The bill then describes the several interests in the lands by which the plaintiffs in error hold title, respectively, and alleges that they are tenants in common, "all having derived their title from their common ancestor, John Martin, by descent."

The bill further alleges that James McLaren acquired said lands by a sale from the United States government, dated December 11, 1834, and a patent dated January 5, 1841.

The bill further alleges that at the sale of said lands under the execution on the judgment against James McLaren,

> "the said John Martin became the highest and best bidder at and for the sum of $760, and the same was knocked off to him by the United States marshal, William M. Gwyn, and the said purchase money was then and there paid by the said John Martin to the said marshal aforesaid, and the said John Martin then and there was put into possession of the aforesaid land by William M. Gwyn, by and with the consent of the aforesaid McLaren, and the said John Martin remained in the continuous, uninterrupted and undisputed possession of the said land, claiming the same as his own property by the title acquired by him at this sale, until his death in the year 1848."

The Amended Bill also states, in aid of the description in the marshal's return, that the land is in Harrison County, Mississippi, and does not contradict the return, but simply supplements, by way of a more particular location, the description of the lands which were in fact sold by the marshal.

The bill further alleges that John Martin never sold

nor made any disposition of any kind of these lands, and that his heirs, the Plaintiffs in Error, have never sold or disposed of any part of said land since they became the owners thereof by descent from the said Martin.

The bill further alleges that the Plaintiffs in Error have been all the while in the constructive possession of said lands, since the death of John Martin in 1848, and that no person or persons ever went into actual possession of the land until the County of Harrison, or the Board of Supervisors thereof, took possession under a donation by deed of June 4, 1902, from J. T. Jones, one of the defendants in error.

The bill further alleges on belief that at the sale, a deed to the lands was made by the United States marshal to John Martin; and in this connection the bill further alleges that another sale of lands was made on the same execution and that deeds were made by the marshal to the purchasers at said sale; and the bill also alleges that the said marshal

> "was a discreet and conscientious officer and was in the habit, as the record shows, of making deeds to the lands sold by him at marshal's sales soon after the sales were made."

The bill further alleges that the records of the county where said lands were situated were destroyed by fire and the records of all deeds were destroyed; and the bill alleges, on belief, that the deed to the lands in controversy was destroyed by said fire.

The bill further alleges that James McLaren died intestate, leaving no heirs at law, either lineal or collateral; further, that the said lands never escheated to the State of Mississippi.

The bill further alleges that while the Plaintiffs in Error were minors of tender years, one J. J. McCaughan, who appears to have been the administrator of the said James McLaren, procured a certified copy of the judgment, execution and the proceedings of the said sale and for the purpose of depriving the plaintiffs in error of their legal right and title to the land, organized a company to take charge of the lands, concealing the facts of the said sale, although the said McCaughan was possessed of a certified copy of the said judgment at the time.

The bill further alleges that the said company kept the facts of the real ownership of the land from the plaintiffs in error, the legal heirs of the said John Martin and sold some of said land, without their knowledge of their legal rights to said property until within the last four or five years.

The bill further alleges that as soon as the facts of the purchase and ownership of the lands by their father John Martin was made known to them, plaintiffs in error at once began to take the necessary legal steps to begin suit to establish their claim. The bill then alleges in detail what was done in this regard.

The bill further alleges that the defendants in error had full notice of the claim and title of the plaintiffs in error before they accepted the gift of the land in controversy from the said J. T. Jones and had full notice of the fraud that had been practiced upon them by the said J. J. McCaughan and his associates from its beginning to the present time; and the bill alleges that the defendants in error participated fully in said

fraud and "became *particeps criminis* in this whole transaction."

The bill further alleges that on March 1, 1901, one S. S. Bullis of New York, quit-claimed to J. T. Jones of Buffalo, all his right, title and interest in and to a certain contract, bearing date November 8, 1895, by and between John Bryant of Cohasset, Massachusetts and the said J. T. Jones, by virtue of which, the said Jones claims right and title of some kind, wholly unknown and unexplained to the plaintiffs in error, to the land in controversy.

The bill denies that the said Bullis had any interest or title to the lands and alleges that he had no right to make any transfer of such title to the said J. T. Jones.

The bill further alleges that the said conveyance to the said Jones "contains no words or syllable or description of the lands attempted to be conveyed."

The bill further alleges that on June 4, 1902, the said J. T. Jones conveyed by deed the land in Gulfport as a gift to the board of supervisors of Harrison County, as aforesaid mentioned, with the condition that should the County of Harrison at any time cease to use the lands for a court house, they should revert to the said J. T. Jones.

The bill further alleges that before the acceptance of the said deed, the defendants in error were expressly notified by the plaintiffs in error of the invalidity of the title of the said J. T. Jones.

The bill further states that if the Supreme Court of Mississippi should decide against the validity of the

said marshal's sale under the said judgment and execution, the plaintiffs in error "claim the right and benefit of an appeal from the final decree to the Supreme Court of the United States."

The bill then prays for relief in substance as heretofore stated.

The bill is sworn to.

Attached to the bill as exhibits are a copy of the judgment and execution in the United States Circuit Court and the marshal's return thereon (Trans., 47 to 50) marked Exhibit "A"; also *Lis Pendens Notice,* marked Exhibit "B"; the quit-claim deed of Bullis to J. T. Jones, marked Exhibit "C"; the deed to the board of supervisors from J. T. Jones, marked Exhibit "D"; and the quit-claim deed from John Bryant to J. T. Jones (Trans., 50 and 52) marked Exhibit "F."

Demurrer.

The grounds of demurrer to the amended bill are substantially as follows:

> "1st. That upon the facts alleged in the said bill and exhibits, the said John Martin did not, by virtue of the said alleged sale by the said United States marshal, acquire either the legal or equitable title to said land.
>
> 2nd. That the said alleged sale by said marshal on the 28th day of October, 1839, in front of the state house in Jackson, was not made at a time or place fixed by law for making such sales and that the said sale to said John Marfin was void, and carried neither title nor the right to title.
>
> 3rd. That the facts alleged in said bill do not warrant the legal conclusion that said complainants are heirs at law of said John Martin or oth-

erwise show that they, the complainants, have any right, title or interest in said lands.

4th. That said bill is a bill seeking to divest the legal title out of the said heirs at law, devisees or legal representatives of said James McLaren, deceased, but does not make such heirs at law, devisees or legal representatives, parties to this suit, and therefore there is a non-rejoinder of proper parties.

5th. That whatever rights or interest the said complainants or their alleged ancestor, John Martin, acquired under said alleged marshal's sale, is now barred by the ten years' statute of limitations.

6th. That the alleged fraudulent concealment that has for half a century, kept complainants in the dark as to their rights, is not alleged to have been the act of the defendant, or of any person in privity with him.

7th. That there is no allegation that any facts in relation to the claim of said complainants as heirs of said John Martin were concealed from complainants by defendants or their privies.

8th. That the bill fails to allege or show that complainants exercised any reasonable diligence to discover the facts in reference to their alleged claim, or that they could not, by the exercise of reasonable diligence have discovered the facts constituting the alleged fraudulent concealment within ten years before the institution of said suit.

9th. Because the exhibits referred to in said bill, and attached to said bill, and the allegations contained in said bill are contradictory.

10th. Because there is no equity on the face of said bill."

Answer of Board of Supervisors.

The answer of the board of supervisors, denying fraud, is substantially as follows:

"Now comes Harrison County by its board of

supervisors, one of the defendants in said bill, and answering said bill of complaint, or so much and such parts thereof as it is advised is necessary to make answer unto for the purpose of denying the allegations of fraud therein contained, defendant says:

They deny that they had any knowledge of any claim of title upon said lands held by the said complainants; and deny that they had any notice of fraud practiced by the said J. J. McCaughan and his coadjutors, or any one else, upon said complainants; and deny that they knew of any facts in relation to the title of said land which would constitute a fraud upon complainants; and deny that the action of said board in accepting said deed of gift was for the purpose of hindering, delaying or defrauding the complainants, or any of them; and denies that any acts of these defendants in relation to said land has in any way hindered, delayed or defrauded the said complainants or any of them. And now having answered said bill for the purpose of denying the fraud therein charged, said defendants pray the judgment of the court on the demurrer herewith filed."

Answer of J. T. Jones.

The answer of J. T. Jones, denying fraud, is substantially as follows:

"Now comes J. T. Jones, one of the defendants in said bill, and answering said bill of complaint, or so much and such parts thereof as he is advised is necessary to make answer to for the purpose of denying the allegations of fraud therein contained, defendant says:

He denies that he had any knowledge of any claim of title upon said lands held by the said complainants; and deny that he had any notice of fraud practiced by the said J. J. McCaughan and his coadjutors, or anyone else, upon said complainants; and deny that they knew of any facts

in relation to the title of said land which would constitute a fraud upon complainants; and denies that any acts of this defendant in relation to said land has in any way hindered, delayed, or defrauded the said complainants or any of them. And now having answered said bill for the purpose of denying the fraud therein charged, said defendant prays the judgment of the court on the demurrer herewith filed."

III.

DECISION OF THE COURT.

The Supreme Court of Mississippi, the court of last resort (Trans., 68) simply affirmed, without either a written or an oral opinion, the judgment of the Chancellor sustaining the demurrer and dismissing the Amended Bill, the judgment of the Supreme Court being as follows (Trans., 64-65):

> "This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Harrison County and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause at the December term, 1905, on December 23, A. D. 1905, be and the same is hereby affirmed by this court; and that the appellees do have and recover of the appellants the costs of this cause in this court and in the court below to be taxed, etc."

On the first appeal to the Supreme Court, which was taken by the defendants in error from the judgment of the Chancellor, *overruling* the demurrer, the Supreme Court reversed the judgment in a written opinion, holding: (1) That the marshal's sale under

the execution on the judgment of the United States Circuit Court was void; and (2) that the claim of the plaintiffs in error was barred by the ten-year statute of limitations, on the ground that the allegation that plaintiffs in error did not obtain knowledge of the concealed fraud until "recent years," was too general and did not show that they were without notice of the fraud ten years prior to the suit. See *Jones* v. *Rogers,* 85 Miss., 802, containing the opinion on the first appeal. (Transcript of Record, 23 to 34.)

The amended bill obviated the objection of the Supreme Court in respect to the statute of limitations by alleging that the plaintiffs in error only obtained knowledge of the fraud "within the last four or five years."

And, furthermore, the Supreme Court subsequently, in the case of *Kennedy* v. *Sanders,* 90 Miss., 524, in express terms overruled the construction which they had placed on the statute of limitations in their opinion on the first appeal in the present case (*Jones* v. *Rogers,* 85 Miss., 802), and characterized it as a mere dictum, not necessary to the decision of the case which they said was based on the question of the validity of the title of plaintiffs in error.

IV.

ERRORS RELIED ON FOR REVERSAL.

"The Supreme Court of the State of Mississippi erred in holding that the judicial sales made by the United States marshal under judgments rendered by the United States Circuit Court for the

Southern District of Mississippi, of the lands in controversy, and under which the complainants claim title to the land in controversy were and are irregular and illegal and conferred no title upon the purchaser at said sales, and under whom the complainants claim title to the lands in controversy. Said sales, as to time, place and all particulars relating thereto are set up with minuteness and particularity in the complainants' bill and amended bill in this case. And which pleadings are now referred to particularly.

One of said sales was made on October 28, 1839, at Jackson, Mississippi, in front of the door of the state house where the United States Court was held in the case of *Wanzer and Harrison* v. *McLaren and Hammond et al.* The other sale was made on October 7, 1839, at the same place under executions issued under the same judgment.

These sales were made under the authority of the Federal Court, and under the Act of Congress of May 19, 1828, and February 16, 1838, and of the General Judiciary Acts of Congress regulating the jurisdiction and forms and modes of procedure in the Federal Courts.

This claim of title made by the complainants is under this federal authority, and it has been wrongfully denied them by the Supreme Court of the State of Mississippi. The decision should have been in favor of the claim under federal authority made by the complainants, and the decision should have upheld these judicial sales."

In their petition for appeal to the Supreme Court of Mississippi, plaintiffs in error stated that they claimed the right of review by the Supreme Court of the United States of any adverse decision against their title by the Supreme Court of Mississippi. (Trans., 62 and 63.)

BRIEF OF POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

I.

THE WRIT OF ERROR WILL LIE IN THIS CASE ON THE GROUND THAT THE SUPREME COURT OF MISSISSIPPI ERRONEOUSLY HELD THAT THE JUDICIAL SALE, MADE BY THE UNITED STATES MARSHAL UNDER A JUDGMENT RENDERED BY THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, AND UNDER WHICH THE PLAINTIFFS IN ERROR CLAIM TITLE TO THE LANDS IN CONTROVERSY WAS IRREGULAR AND VOID AND CONFERRED NO TITLE UPON THE PURCHASER AT SAID SALE.

Avery v. *Popper*, 179 U. S., 305, 310, citing and reviewing the following cases:

Collier v. *Stanbrough*, 6 How., 14.
Erwin v. *Lowry*, 7 How., 172.
Clements v. *Berry*, 11 How., 398.
Freeman v. *Howe*, 24 How., 450.
Buck v. *Colbath*, 3 Wall., 334.
Etheridge v. *Sperry*, 139 U. S., 266.
Bock v. *Perkins*, 139 U. S., 628.
Day v. *Gallup*, 2 Wall., 97.
Dupasseur v. *Rochereau*, 21 Wall., 130.
McKenna v. *Simpson*, 129 U. S., 506.
O'Brien v. *Weld*, 92 U. S,, 81.
Factors and Traders Insurance Co. v. *Murphy*, 11 U. S., 738.
Stanley v. *Schwalby*, 162 U. S., 255.
Pittsburg, Cincinnati, etc., Railroad v. *Long Island Loan & Trust Co.*, 172 U. S., 493.

Tulloch v. *Mulvane,* 184 U. S., 497, 507, citing:

Avery v. *Popper,* 179 U. S., 305.

Dupasseur v. *Rochereau,* 21 Wall., 130.

Factors and Traders Insurance Co. v. *Murphy,* 111 U. S., 738.

Crescent Live Stock Co. v. *Butcher's Union,* 120 U. S., 141.

Meyers v. *Block,* 120 U. S., 206.

Commercial Pub. Co. v. *Beckwith,* 188 U. S., 567, 569.

Sharpe v. *Doyle,* 102 U. S., 686, 688.

McNulta v. *Lochridge,* 141 U. S., 327, 331; cited in: *Nutt* v. *Knut,* 200 U. S., 12, 19; *Illinois Central Railroad Co.* v. *McKendree,* 203 U. S., 514, 526.

A federal question is sufficiently set up or claimed when it appears that the contentions involving it were raised by the pleadings or called to the attention of the court in some proper way.

Tulloch v. *Mulvane,* 184 U. S., 497, 503.

Sayward v. *Denny,* 158 U. S., 180.

Chouteau v. *Gibson,* 111 U. S., 200.

Yates v. *Jones National Bank,* 206 U. S., 158, 167.

II.

THE NON-FEDERAL QUESTION OF THE STATUTE OF LIMITATIONS, WHICH WAS DECIDED BY THE SUPREME COURT OF MISSISSIPPI ON THE FIRST APPEAL, HAS BEEN ELIMINATED FROM THE CASE BY THE AMENDED BILL AND THE ANSWER OF THE DEFENDANTS IN ERROR THERETO; AND ALSO BY A SUBSEQUENT DECISION IN ANOTHER CASE OVERRULING THAT PART OF THE OPINION.

The decision of the Supreme Court of Mississippi, on the first appeal (*Rogers* v. *Jones*, 85 Miss., 802) has been expressly overruled in the subsequent case of *Kennedy* v. *Sanders*, 90 Miss., 524, which held that the real ground of the decision was the question of the validity of the title of plaintiffs in error, and that that part of the opinion in respect to the Statute of Limitations was a mere dictum, and, furthermore, was incorrectly decided.

If, therefore, the question of the Statute of Limitations were in this case (which we deny) the decision of it by the Supreme Court on the first appeal would have to be held by this court to be palpably erroneous.

Johnson v. *Risk*, 137 U. S., 300, 307.
Murdock v. *City of Memphis*, 20 Wall. (87 U. S.), 590.
Maguire v. *Tyler*, 8 Wall. (75 U. S.), 650, 664, 665.
Berea College v. *Kentucky*, 211 U. S., 45, 53.

It is elementary that a certificate of a court of

last resort may serve to "elucidate the determination whether a federal question exists."

Illinois Central Railroad Co. v. *McKendree,* 203 Ill., 514, 525.

Where on error to the Supreme Court of the state, the record shows a decision of the State Court on a federal question properly presented, and of which this court could take jurisdiction, and shows also the decision of the local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the federal question was erroneously decided.

Railroad Company v. *Maryland,* 20 Wall., (87 U. S.), 643.

It is the duty of the State Courts to decide federal questions; if errors supervene, the remedy is open to the aggrieved party.

Arkansas v. *Kansas, etc., Coal Co.,* 183 U. S., 185, 190, 191.

The Defiance Water Co. v. *Defiance,* 191 U. S., 184, 193, 194.

Robb v. *Connolly,* 111 U. S., 624.

There is no such defense as laches in Mississippi.

Cox v. *Mortgage Company,* 88 Miss., 88, 97, 98.

There must be no overlapping of defenses; and if the same matter is covered to any extent by a demurrer

and also by an answer, the demurrer should be overruled.

Fall v. *Hafter,* 40 Miss., 606.
Pieri v. *Schieldsboro,* 42 Miss., 493.
Sledge v. *Dickson,* 81 Miss., 501.
Hentz v. *Delta Bank,* 76 Miss., 429.

Where there has been no adverse possession the true owner is not barred by the ten years' statute of limitations.

Kennedy v. *Sanders,* 90 Miss., 524.

Mere adverse possession alone is not sufficient to defeat the title of the true owner; it must be shown that the true owner knew the adverse party claimed in his own right, or the possession must be so open and notorious as to raise the presumption of notice.

Dothard v. *Denson,* 72 Ala., 541, 544.

And it is only when it clearly appears from the face of the bill that the equity of the complainant is barred by the Statute of Limitations, that the bill can be dismissed on demurrer for that cause.

Lincoln v. *Purcell,* 2 Head. (Tenn.), 143.

The Statute of Limitations can be interposed by demurrer only when it appears from the date set out in the bill that the time prescribed by the statute has elapsed before the commencement of the suit.

Neddy v. *State,* 8 Yerger (Tenn.), 251.

III.

THE ALLEGATIONS IN THE AMENDED BILL SHOW THAT THE SALE OF THE LANDS IN CONTROVERSY BY THE UNITED STATES MARSHAL, UNDER A JUDGMENT OF THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, WAS VALID AND CONFERRED TITLE UPON JOHN MARTIN, THE PURCHASER AT SAID SALE, THROUGH WHOM THE PLAINTIFFS IN ERROR CLAIM TITLE TO THE LAND.

Where a federal question is presented,

> "the duty of this court to apply to such question its own conceptions of the general law we think is incontrovertible."
>
> *Tulloch* v. *Mulvane*, 184 U. S., 497, 513.

On demurrer every reasonable presumption is to be indulged in favor of rather than against the bill.

> *Lincoln* v. *Purcell*, 2 Head. (Tenn.), 143, 154.

The rules of pleading in chancery are not so precise and strict as at law, and are more flexible in their modification, and can be more readily made to suit the equity of the case and the policy of the court.

> *Brinkerhoff* v. *Brown et al.*, 6 Johns Chancery (New York), 139, 156.
>
> *Crane* v. *Deming*, 7 Conn., 386, 393.
>
> *Cornelius* v. *Halsey*, 11 N. J. Eq., 27, 28.
>
> *Ransom* v. *Geer*, 30 N. J. Eq., 249, 252.

A bill in equity will not be dismissed where a case proper for equitable relief appears, although defectively stated, for such construction will be given as will support rather than defeat the bill. Every reasonable

presumption is to be indulged in favor of rather than against the bill.

Anderson v. *Mullenix*, 5 Lea (73 Tenn.), 287, 289.

Kerr v. *Kerr*, 3 Lea (71 Tenn.), 224, 227.

Thompson v. *Nance*, 8 Humph. (27 Tenn.), 114, 117.

Rules in equity pleading are not so strict as at common law.

1 Daniell's Chancery (6th Am. Ed.), star p. 362.

There must be a clear conflict between the allegations of a bill and an exhibit, before it will be held that there is a contradiction.

In this case the allegations of the Amended Bill do not contradict the return, but are simply in aid of the recitals made in the return.

Where an exhibit to a bill did not *affirmatively show* that certain persons *were not* made parties to a former suit, the court held that the exhibit did not contradict an averment in the bill that said persons were made parties to the former suit.

Holman v. *Patterson*, 29 Ark., 357, 363.

Where a bill alleges that a mortgage was deposited with the county clerk and the mortgage, which is attached as an exhibit, does not show that it was filed with the clerk, there is no contradiction or inconsistency between the bill and the exhibit.

Freiberg et al. v. *Magale*, 70 Tex., 116, 118.

An averment in a declaration supplementing the

description in a sheriff's return was considered by the court in identifying land.

Hand & Huddleston v. *Grant*, 5 S. & M. (13 Miss.), 508, 512, 513.

No special form of return is required.

There is no statute in Mississippi which declares that a marshal or sheriff's sale shall be void unless the sheriff returns on the execution the property levied on and sold.

Hamblen v. *Hamblen*, 33 Miss., 455, 461, 462.

No precise form of return is prescribed by law.

Byer v. *Etnyre*, 2 Gill., (Md.), 150.

If the language used by an officer making a return fairly admits of a construction which will sustain the validity of the return, it should be so construed.

Reinhardt v. *Kennedy*, 106 Ill. App., 96, 97.

The statute does not prescribe any form of return and does not provide that the return shall show the manner in which the levy was made.

Jones v. *Meyer Bros.*, 25 Tex. Civil App., 234, 236, 237.

"Nice criticisms of the words used by the sheriff" in his return on a summons will not be indulged. It will be sufficient if it can be fairly inferred from his return that he met the requirements of the law.

Bacon v. *Bevan*, 44 Miss., 293, 295.

Where an officer's return is susceptible of different

meanings, that one should be adopted which is most conformable to his legal duty.

Whittlesey v. *Starr*, 8 Conn., 134, 137.

The ascertainment of the intention is the object of all construction. In construing statutes, words may be supplied or altered to give effect to the intention.

Loverin v. *McLaughlin*, 161 Ill., 417, 430.

Title of purchaser does not depend on return.

The title of the purchaser at an execution sale does not depend on the return, and any informality or irregularity therein, or even the absence thereof, will not affect his title.

Remington v. *Linthicum*, 14 Peters (39 U. S.), 84.

Wheaton v. *Sexton*, 4 Wheat. (17 U. S.), 503, 506.

Minor v. *The President & Selectmen of Natchez*, 4 S. & M. (12 Miss.), 602.

Doe v. *Natchez Ins. Co.*, 8 S. & M. (16 Miss.), 197.

Cockerel v. *Wynn*, 12 S. & M. (20 Miss.), 117, 123.

Cooper v. *Granberry*, 33 Miss., 117.

Hamblen v. *Hamblen*, 33 Miss., 455, 461, 462.

Duke v. *Clark*, 58 Miss., 465, 473.

Quarles v. *Hiern*, 70 Miss., 891.

Stevenson's Heirs v. *McReary*, 12 S. & M. (20 Miss.), 9, 54.

Preston v. *Wright*, 60 Ia., 351, 354.

Shaffer v. *Bolander*, 4 G. Gr. (Ia.), 201.

Johnson v. *Carson,* 3 G. Gr. (Ia.), 499, 500.
Beattie v. *Robin,* 2 Vt., 181.
Whittlesey v. *Starr,* 8 Con., 134, 137.
Hale v. *Talbott,* 86 Ind., 447, 450.
East Greenwich v. *Allen,* 47 Atlantic (Rhode Island), 885.
Jones v. *Meyer Bros.,* 25 Tex. Civil App., 234, 236, 237.
Davidson v. *Chandler,* 65 S. W. (Tex.), 1080.
Phillips v. *Coffee,* 17 Ill., 154, 156.
Stribling v. *Prettyman,* 57 Ill., 371.
Durossetts Administrator v. *Hale,* 38 Mo., 346, 348, 349.
Ingram v. *Belk,* 2 Strob. Law (24 S. C. Law), 207, 217, 220.
Miller v. *Grady,* 88 S. W., 963.

It is also similarly held in respect to judicial sales generally, that the title of a purchaser is not invalidated by any irregularity of the officer making the sale.

Hanks v. *Neal,* 44 Miss., 212.
Stevenson's Heirs v. *McReary,* 12 S. & M. (20 Miss.), 9, 54, 55.
Lum v. *Reed,* 53 Miss., 73.
Cornett v. *Williams,* 20 Wall. (87 U. S.), 226, 249, 250.
McNitt v. *Turner,* 16 Wall. (83 U. S.), 352.

Every intendment is indulged to support judicial sales.

Cornett v. *Williams,* 20 Wall. (87 U. S.), 226, 249, 250.
Hamblen v. *Hamblen,* 33 Miss., 455.
Quarles v. *Hiern,* 70 Miss., 891.

Whittlesey v. *Starr,* 8 Con., 134.
Hale v. *Talbott,* 86 Ind., 447, 450.
Jones v. *Meyer Bros.,* 25 Tex. Civil App., 234, 236, 237.
Byer v. *Etnyre et al.,* 2 Gill (Md.), 150, 158, 159.

Where a statute provided that the execution debtor and the plaintiff may choose an appraiser at an execution sale and that, in the absence of either party, the officer making the sale shall choose one or both, the failure of the return to show that the *defendant was absent* did not invalidate the sale.

Preston v. *Wright,* 60 Ia., 351.

Where a sheriff's return does not state that the advertisement of the sale was made in a newspaper *at the request* of the defendant, it may be shown by proper evidence.

Minor v. *The President and Selectmen of Natchez,* 4 S. & M. (12 Miss.), 602, 621, 623.

The burden of proof is on the party attacking a sale by execution, not on the party claiming under the sale.

Beeler's Heirs v. *Bullitt's Heirs,* 3 A. K. Marshall (Ky.), 280.

Description of property in the return.

If the description in a sheriff's return is such as to enable the property to be identified, it is sufficient.

Hand & Huddleston v. *Grant,* 5 S. & M. (13 Miss.), 508, 511, 512.
Peacher v. *Strauss et al.,* 47 Miss., 353, 361.
Smith v. *Low,* 24 N. C., 457, 460.

Berry v. *Griffith,* 2 Har. & G. (Md.), 337, 343.
Guelot v. *Pearce,* 38 S. W. (Ky.), 892, 893.
Swiggett v. *Kollock,* 3 Houst. (Del.), 326, 333.

Failure of sheriff to comply with the statute in respect to the description in his return does not affect the title of the purchaser.

Jackson v. *Walker,* 4 Wend. (N. Y.), 463.

Extrinsic evidence is admissible in aid of the description of a sheriff's return or deed.

Peacher v. *Strauss et al.,* 47 Miss., 353, 361.
White et al. v. *Luning,* 93 U. S., 514, 523, 524.
Cox v. *Hart,* 145 U. S., 376.
Smith v. *Low,* 24 N. C., 457, 460.
Buckner v. *Vancleave,* 78 S. W. (Tex.), 541.
Woods v. *Hayes,* 107 S. W. (Ark.), 387.
Randolph v. *Carlton,* 8 Ala., 606, 614.
Laughlin v. *Hawley,* 9 Col., 170, 174.

And generally stated, the rule is that parol evidence is admissible to support a sheriff's return.

Wade v. *United States,* 158 U. S., 232, 238, 239.
Minor v. *The President and Selectment of Natchez,* 4 S. & M. (12 Miss.), 602, 621.
Duke v. *Clark,* 58 Miss., 465, 473.
Harvie v. *Bostic,* 1 How. (2 Miss.), 106, 107.
Davidson v. *Chandler,* 65 S. W., 1080.
Evans v. *Davis,* 42 Ken. (3 B. Monroe), 344.
Kuhn v. *Kilmer,* 16 Neb., 699.

The return of the sheriff is not conclusive, but only *prima facie* evidence of a sale.

Joyner v. *Miller,* 55 Miss., 208, 210.

Minor v. *Natchez,* 4 S. & M. (12 Miss.), 602, 623.

Signature to the return.

Parol proof is admissible to explain the signature on a sheriff's return.

Harvie v. *Bostic,* 1 How. (2 Miss.), 106.

Hand & Huddleston v. *Grant,* 5 S. & M. (13 Miss.), 508, 513.

Emley v. *Drum,* 36 Penn. State, 123, 125.

Humphrey's Executors v. *Wade,* 84 Ken., 391, 399.

A return signed "W. F. Gillespie, D. S.," was held sufficient under a statute requiring a sheriff's return to be signed in the name of the sheriff.

Humphrey's Executors v. *Wade,* 84 Ken., 391, 396, 399.

"A. G. Anderson, D. S., per Thos. Shanks, S. J. C.," was held to be a proper signing of a sheriff's return.

Guelot v. *Pearce,* 38 S. W. (Ky.), 892, 893.

A return signed, "Matt. Birchard, by J. L. Rewey, deputy sheriff," was held to be good.

Martin v. *Aultman,* 80 Wis., 150, 152.

Presumptions.

It will not be presumed that some one usurped the powers of the sheriff and levied on an estate without authority.

Humphrey's Executors v. *Wade,* 84 Ky., 391, 397, 398, 399.

The court will take judicial notice of the sheriff of a county.

Martin v. *Aultman,* 80 Wis., 150, 152.

When an execution is directed to the sheriff of a certain county, it must be presumed that the land levied upon was in that county because the sheriff could not levy on land outside of his county.

Camp v. *Smith,* 98 Ind., 409.

When a sheriff is commanded to attach the defendant's estate, it will not be presumed that he levied on the property of another person.

Randolph v. *Carlton,* 8 Ala., 606, 614.

Where a deputy clerk signs a certificate, it will be presumed that the facts existed which gave him that right.

Delaney v. *Schuette,* 49 Wis., 366.

It will be presumed that there is such an office as deputy prothonotary, until the contrary is shown.

Greasons v. *Davis,* 9 Ia., 219, 224.

Deed not necessary.

A deed under a sheriff's sale is not necessary to perfect the title of the purchaser, as it is nothing more than the evidence of the sale; and the title is transferred by operation of law.

Remington v. *Linthicum,* 14 Peters (39 U. S.), 84, 92.
Borings, Lessee v. *Lemmon,* 5 Har. & Johns. (Md.), 223, 225.
Barney v. *Patterson's Lessee,* 6 Har. & Johns. (Md.), 182, 204.
Knowles v. *Sullivan,* 182 Mass., 318, 319.
Cooper v. *Granberry,* 33 Miss., 117.
Davis v. *Wilcoxen,* 5 La. Ann., 583, 584.
Jouet v. *Mortimer,* 29 La. Ann., 206, 213.
Pennsylvania, etc., Co. v. *Cleary,* 125 Penn. State, 442, 451.
Reeder v. *Eidson,* 102 S. W. (Tex.), 750, 751.
Willis v. *Smith,* 66 Tex., 31, 43.
Leland v. *Wilson,* 34 Tex., 79.
Miller v. *Alexander,* 8 Tex., 36, 44.
Dickinson v. *Kinney,* 5 Minn., 332, 337.
Lash v. *Perry,* 19 Ind., 322, 323.
Elliott v. *Dycke,* 78 Ala., 150, 155.
Normant v. *Eureka,* 98 Ala., 181, 187.

Where a purchaser at a sale of lands under an execution takes possession and holds it continuously for thirty-five years, the law will presume that a deed was executed by the sheriff.

Normant v. *Eureka,* 98 Ala., 181, 187.

Possession and long use may raise the presumption of a deed; the length of time necessary to create such presumption may be within a period short of the statute of limitations.

Fletcher v. *Fuller,* 120 U. S., 534, 545, 550.

The authorities abundantly prove that in favor of long possession almost every variety of written evidence of title will be presumed.

The Grand Gulf Railroad, etc. v. *Ryan,* 8 S. & M. (16 Miss.), 234, 279.

Adverse possession for thirty-four years under an administrator's deed is sufficient to justify the presumption that all the preliminary steps were taken necessary to enable the administrator to sell.

Stevenson's Heirs v. *McReary,* 12 S. & M. (20 Miss.), 9, 45, 46, 47.

Lapse of twenty years, with proof that the probate office had been kept in a loose and careless manner, raises the presumption that an administrator posted notices which were necessary to a valid sale.

Gray v. *Gardner,* 3 Mass., 399.

A party claiming title under a sheriff's sale need only produce the judgment and execution, to entitle the deed to be admitted in evidence.

Stribling v. *Prettyman,* 57 Ill., 371.

The sheriff could be compelled to execute a deed.

People v. *Grant,* 61 N. Y. App. Div., 238.

Normant v. *Eureka,* 98 Ala., 181.

By statute in Mississippi a sheriff can be compelled

to execute a deed. The statute provides, in part, as follows:

> "And in case any * * * sheriff * * * should, for any cause whatever, fail or omit to make such conveyance, without good cause for the omission or failure, during his continuance in office, the court which rendered the judgment or decree may, on petition for that purpose, order the successor of such * * * sheriff * * * to make a proper conveyance to the purchaser. * * *"

Section 2771, Code of Mississippi, 1906.

Statute of Frauds.

A sheriff's return on an execution, under which there was a sale of real estate, must be regarded as a sufficient memorandum to take the case out of the statute of frauds.

Hand & Huddleston v. *Grant,* 5 S. & M. (13 Miss.), 508.

Remington v. *Linthicum,* 14 Peters (39 U. S.), 84, 92.

Borings Lessee v. *Peterson,* 6 Har. & Johns, (Md.), 204.

Under Section 500 of the Code of Mississippi a bill in equity will lie to remove clouds upon title, if the complainant have either a perfect legal or a perfect equitable title.

Jones v. *Rogers,* 85 Miss., 802.

Gentry v. *Gamblin,* 79 Miss., 437.

ARGUMENT.

I.

THE WRIT OF ERROR WILL LIE IN THIS CASE ON THE GROUND THAT THE SUPREME COURT OF MISSISSIPPI ERRONEOUSLY HELD THAT THE JUDICIAL SALE MADE BY THE UNITED STATES MARSHAL UNDER A JUDGMENT RENDERED BY THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, AND UNDER WHICH THE PLAINTIFFS IN ERROR CLAIM TITLE TO THE LAND IN CONTROVERSY, WAS IRREGULAR AND VOID, AND CONFERRED NO TITLE UPON THE PURCHASER AT SAID SALE.

The material allegations of the Amended Bill relating immediately to the marshal's sale, show substantially the following facts: The plaintiffs in error are claiming title to the lands in controversy by virtue of a judicial sale made by the United States marshal on the 28th day of October, 1839, at Jackson, Mississippi, under a judgment obtained in the United States Circuit Court at Jackson for the Southern District of Mississippi. The sale was made before the front door of the state house at Jackson, at the written request of the defendant in execution, James McLaren. At this sale John Martin, father of plaintiffs in error (Trans., 39; Sec., 64), through whom the plaintiffs in error claim title, by descent, became the highest and best bidder for the lands "for the sum of $760," and "the same was knocked off to him by the United States marshal, William M. Gwyn." The said purchase money was "then and there" paid by Martin to the marshal, and Martin was "then and there put

into possession of the aforesaid land by William M. Gwyn, by and with the consent of the aforesaid McLaren; and the said John Martin remained in the continuous, uninterrupted and undisputed possession of the said land, claiming the same as his property by the title acquired by him at this sale, until his death in the year 1848." (Trans., 38, 39.) It is stated that "if the Supreme Court of this state shall decide against the validity of this sale, these, your orators, claim the right and benefit of an appeal from said final decree to the Supreme Court of the United States." (Trans., 40.) And in their petition on appeal to the Supreme Court of Mississippi, the plaintiffs in error set up their claim to a federal question, stating as follows:

> "That they claim the aforesaid land under and by virtue of a sale by the United States marshal at Jackson, Mississippi, under an Act of Congress of the United States under an execution issued on judgments of the Circuit Court of the United States, as shown by the pleadings in this cause, and they ask specifically, that the court pass upon this federal question, and in the event it is decided adversely to them, they pray that they may be granted an appeal to the Supreme Court of the United States from this decision, made under the laws and constitution of the United States." (Trans., 62, 63.)

The decision of the Supreme Court of Mississippi was against the validity of the claim thus set up under the Acts of Congress and of the federal authority exercised by the said federal court. (Trans., 64, 65.)

The Supreme Court of Mississippi had the undoubted right to decide the federal question, and plain-

tiffs in error are possessed of the equal right to have that decision reviewed if error has supervened.

Arkansas v. *Kansas, etc. Co.*, 183 U. S., 185, 190, 191.

The Defiance Water Co. v. *Defiance*, 191 U. S., 193, 194.

Robb v. *Connolly*, 111 U. S., 624.

On the showing made by the pleadings and the record we presume there will be no controversy as to whether the federal question was sufficiently set up or claimed at the proper time and in the proper way in the state court.

It is well settled that if the contentions involving a federal question are raised by the pleadings or called to the attention of the court in some proper manner, the federal question is sufficiently set up or claimed.

Tulloch v. *Mulvane*, 184 U. S., 497, 503.

Sayward v. *Denny*, 158 U. S., 180.

Chouteau v. *Gibson*, 111 U. S., 200.

Yates v. *Jones National Bank*, 206 U. S., 158, 167.

Assuming that the claim of the federal question is properly presented by the plaintiffs in error, it then becomes necessary to determine whether their claim of title to the lands sold by the United States marshal under the judgment obtained in the United States Circuit Court, draws in question an authority exercised under the United States. There is abundant authority which clearly supports this contention and in our opinion frees it from all doubt.

The case of *Avery* v. *Popper*, 179 U. S., 305, which

is one of the leading cases, announces the controlling principles. In that case a chattel mortgagee of certain cattle brought an action against the purchaser of the same at a marshal's sale on an execution under judgment in a Federal Court. The purchaser claimed a special right, under Section 709 of the Rev. Stat., to a priority of payment of the proceeds of sale, as against the chattel mortgagee, and the State Supreme Court decided adversely to this claim. The validity of the title acquired at the sale was not involved. After reviewing numerous authorities, bearing on the question as to whether a federal question was presented the court held there was none on that record, but in discussing the rule governing this class of cases said (p. 314):

> "With respect to writs of error from this court to judgments of State Courts, in actions between purchasers under judicial proceedings in the Federal Courts and parties making adverse claims to the property sold, the true rule to be adduced from these authorities is this: That the writ will lie, if the validity or construction of the judgment of the Federal Court, or the regularity of the proceedings under the execution are assailed; but if it be admitted that the judgment was valid and these proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property, as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no federal question is presented—in order words, it must appear that the decision was made against the right claimed under federal authority in the language of Rev. Stat., Section 709. Applying this test to the case under consideration, it is evident from the record that no question was made as to the validity of the judgment or the regularity of the proceedings in the Federal Court; and that

> the case turned upon the question whether, under the laws of Texts, a chattel mortgage upon property sold under execution is good, which does not identify the particular property covered by it, but leaves such property to be subsequently identified by selection of the mortgagor."

In the present case, the plaintiffs in error are claiming *title* to land under a United States marshal's sale, under a federal judgment, which sale the State Court has declared to be irregular and void. So that the case at bar comes clearly within the rule above announced to the effect,

> "that the writ will lie, if the validity or construction of the judgment of the Federal Court, or the regularity of the proceedings under the execution are assailed."

In *Freeman* v. *Howe et al.*, 24 How., 450, where a United States marshal, under the authority of the Circuit Court of the United States, attached a number of railroad cars, which were taken from him subsequently by the sheriff under a writ of replevin, this court said, in discussing the question of assuming jurisdiction on a writ of error to the Supreme Judicial Court of Massachusetts (p. 459):

> "But the question is which tribunal, the federal or state, possesses the power to determine the question of jurisdiction or validity of the process? The effect of the principle stated by the chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the Federal Court, as a moment's consideration will show. It would draw after it into the State Courts, not only all questions of liability of property seized upon *mesne* and final process issued under the authority of the Federal Courts, including the admiralty, for this court can be no exception, for the purposes for which it was seized, but also the arrests upon

mesne and imprisonment upon final process of the person in both civil and criminal cases for in every case the question of jurisdiction could be made; and until the power was assumed by the State Court and the question of jurisdiction of the Federal Court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another. But we shall not pursue this branch of the case further."

This case has been approved in a long line of decisions, including the late case of the *Wabash Railroad* v. *Adelbert College,* 208 Ill., 38, 54.

In *Bock* v. *Perkins,* 139 U. S., 628, in which a United States marshal, who was sued in a State Court for trespass for a levy made under the authority of the United States Circuit Court, removed the case to the Federal Court, on an appeal to the Supreme Court of the United States, the court said (pp. 630, 631):

"The court below properly retained the case for trial. Every marshal of the United States, as well as his deputy, must take an oath or affirmation that he will faithfully execute all lawful precepts directed to him and in all things well and truly perform the duties of his office. The marshal must also give bond with sureties, for the faithful performance of the duties of his office by himself and deputies. And marshals and their deputies have, in the respective states, the same powers, when executing the laws of the United States, as sheriffs and their deputies have in executing the laws of such states. Rev. Stat., Sections 782, 783, 788. A case, therefore, depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from

a court of the United States, is one arising under the laws of the United States; for as this court has said 'cases arising under the laws of the United States are such as grow out of the jurisdiction of the courts, whether they constitute the right or privilege or claim or protection or defense of the party, in whole or in part, by whom they are asserted.' *Tennessee* v. *Davis*, 100 U. S., 257, 264; *Railroad Company* v. *Mississippi*, 102 U. S., 135, 141. * * * No different doctrine was announced in *Buck* v. *Colbath*, 3 Wall., 334. On the contrary, that case sustains the view we have just expressed."

In *Sharpe* v. *Doyle*, 102 U. S., 686, 688, where a marshal of the United States, to whom was directed a warrant of provisional seizure sued out of the proper court sitting in bankruptcy, levied it upon certain goods in the possession of a third party claiming title to them, the court said in discussing an instruction which raised a federal question (p. 688):

"This charge to which exception was taken was decisive of the case, there being no doubt that persons other than the bankrupts had, under claim of title, the possession of the goods at the time they were seized under the warrant. The defendant asserted a right to them, under the laws of the United States, on the ground that the pretended purchase by the plaintiffs was a fraud upon the bankrupt law and passed no title; that the ownership was, by virtue of the bankruptcy proceedings, in the assignee; and that the plaintiffs were not entitled to recover. The right so claimed was decided adversely to the defendant. The instruction was affirmed in a court of last resort and its soundness depends upon the authority conferred on him by the writ. The case is therefore a proper one for a writ of error from this court."

In *Stanley* v. *Schwalby*, 162 U. S., 255, a petition was

filed in the State Court of Texas, claiming an interest in land and praying judgment for the recovery of the title to such interest. The answer, among other things, alleged that the title to the land was in the United States. The judgment of the State Court was in favor of the petitioner and against the claim of title in the United States. In assuming jurisdiction of the case, on the ground that it involved a federal question, the court said (pp. 278, 279):

> "But so far as the judgment of the State Court against the validity of an authority set up by the defense under the United States necessarily involves the decision of a question of law. It must be reviewed by this court, whether that question depends upon the constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on *mesne* process issued by a court of the United States and is used in an action of trespass in a State Court by one claiming title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the state, he may bring the case by writ of error to this court; and as his justification depends upon the question whether the title to the property was in the defendant in attachment, or in the plaintiff in the action of trespass, this court upon the writ of error has the power to decide that question, so far as it is one of law, even if it depends upon local law, or upon general principles. (Citing cases.)"

In *McNulta* v. *Lochridge,* 141 U. S., 327, 331, in which there was an adverse judgment of a State Court upon the claim of a receiver appointed by a Federal Court

of immunity from suit without leave of the appointing court first obtained, the court said (p. 331):

> "Now, as McNulta was exercising an authority as receiver, under an order of the Federal Court and claimed immunity as such receiver from suit, without the previous leave of such court and the decision was adverse to such claim, he is entitled to a review of such ruling, whether his claim be founded upon the statute or upon the principles of general jurisprudence. We regard this as a legitimate deduction from the opinions of this court in *Buck* v. *Colbath*, 3 Wall., 334; *Feibelman* v. *Packard*, 109 U. S., 421; Pacific Railroad removal cases, 115 U. S., 1; *Etherirde* v. *Sperry*, 139 U. S., 226; and *Bock* v. *Perkins*, 139 U. S., 628. The motion to dismiss must therefore be denied."

In *Commercial Publishing Co.* v. *Beckwith*, 188 U. S., 567, in which the Supreme Court of the State of Tennessee held that a sale made under decrees, both of the United States and State Courts, was a nullity, in determining the question of jurisdiction, the court briefly disposed of it in these words (p. 569):

> "As in the complaint the plaintiff in error unquestionably set up a right to recover, as the result of a judicial sale made under decrees, both of courts of the United States and of the state, federal questions exist in the record, and the motion which has been made to dismiss is therefore denied."

In *Tulloch* v. *Mulvane*, 184 U. S., 497, where the question presented was whether in a state court on an injunction bond given in the federal court, the liability of the bond is governed by the law of the United States Courts or by that of the state court, the court said (pp. 504, 505, 506):

> "It may not we think be doubted that a bond for injunction in an equity court of the United

States, given under the order of such a court, is a bond executed in and by virtue 'of an authority exercised under the United States.' Rev. Stat., Sec. 709. Certainly, the courts of the United States derive all their powers from the constitution and laws of the United States, and their authority is therefore exercised thereunder. Being an obligation entered into by virtue of such authority, the conclusion cannot be escaped that the defense specially set up that no liability on the bond could arise until the court of the United States, in which the controversy was pending, had finally determined that the injunction should not have been granted, was the assertion of an immunity from liability depending on an authority exercised under the United States, and therefore necessarily involved the decision of a federal question. To state the result which must necessarily follow from a contrary deduction is sufficient of itself to demonstrate the unsoundness of the reasoning by which the non-federal nature of the question can alone be upheld. For it is clear that if it be true that a bond given in a federal court of equity on the granting of an injunction is not to be considered with reference to the rules of law applicable to such bonds in such court, then there can be no certain general rule by which to determine the liability of the obligors upon the bond. Their responsibility would be one thing in a court of the United States and a different thing in the courts of the various states, which would imply that the parties did not contract with reference to any definite rule of liability. Indeed, the argument conduces to a conclusion which necessarily cripples the power of the court under whose order an injunction bond is executed. It is settled that such court has the inherent right to set the bond aside and determine in its discretion whether recovery could be had upon it. *Russell* v. *Farley*, 105 U. S., 433. And yet if the liability upon the bond when given can be measured in courts other than the court requiring the execution of the bond, by

> wholly different rule of liability from that which obtained in the court which had ordered the giving of the bond, it must follow that although the latter court had decreed that the injunction had rightfully issued, yet in an action upon the injunction bond in another forum, the sureties might be made to respond any damages without hope of redress. A reference to some of the decided cases concerning what constitutes a claim of immunity arising from an authority exercised under the United Sttaes, will serve at once to refute the contention that no federal question is here presented."

The court then reviewed with approval, among others the case of:

Avery v. *Popper*, 179 U. S., 305.

The reasoning of the case of *Tulloch* v. *Mulvane*, 184 U. S., 497, above cited, is directly applicable to the present case, for if in this case, the marshal's sale under a judgment in the United States Court can be declared invalid by a state court of last resort, without being subject to review by the Supreme Court of the United States, the manifest result would be to place the power in a state court to nullify a federal judgment, or at least to limit its scope and effect by invalidating a sale thereunder. If it could be assumed that in passing on the question, a state court would always reach the same decision that the United States Supreme Court would arrive at, of course no practical injury or confusion of decisions would result, but necessarily these two tribunals would not always coincide in their views on the law and it would be a most unwise policy for the Supreme Court of the United States to relinquish, or even to relax the exercise of its power to re-examine the judgments

of the state courts, where, as in the present case, the validity of a title acquired at a United States marshal's sale under a federal judgment is drawn in question. Although this court exercises such power with consideration and respect for the state court, nevertheless when the exigencies of the case have required it, this court has unhesitatingly and firmly assumed this right of review.

II.

THE NON-FEDERAL QUESTION OF THE STATUTE OF LIMITATIONS WHICH WAS DECIDED BY THE SUPREME COURT OF MISSISSIPPI ON THE FIRST APPEAL, HAS BEEN ELIMINATED FROM THE CASE BY THE AMENDED BILL AND THE ANSWER OF THE DEFENDANTS IN ERROR THERETO; AND ALSO BY A SUBSEQUENT DECISION IN ANOTHER CASE OVERRULING THAT PART OF THE OPINION.

On the first appeal the Supreme Court of Mississippi delivered a written opinion. (Trans., 23, 24. *Jones* v. *Rogers*, 85 Miss., 802.)

On the second appeal no opinion whatever was rendered. (Trans., 64, 65.)

The decision on the first appeal was placed on two grounds: First, that the claim of title of the plaintiffs in error under the marshal's sale was void and conferred no title; and Second, that whatever rights the plaintiffs in error may have acquired under said sale were barred by the Statute of Limitations.

The question of the Statute of Limitations.

In considering the question of the Statute of Limitations which prescribed a period of ten years, the court said on the first appeal (Trans., 33, 34):

> "The complainants here are 'claiming this land in equity' and not having brought their suit to recover it within the 'period' prescribed by Section 2731, are clearly barred,—unless the allegations of their bill bring them with the last clause thereof, which is as follows: 'But in every case of concealed fraud the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.' The bill only avers in a general vague and indefinite way 'that after the sale (which was over sixty-four years ago) that '*divers* persons' (without stating *who*) set about to cheat and defraud them out of the lands (without stating *how*), sell and convey same, combined and confederated to get possession and dispose thereof, and concealed and secreted as far as possible all facts of this sale from complainants who have just of recent years learned the facts. * * * Complainants aver only in a general way that they learned of the facts just of 'recent years' without stating how long they had known of it, or what diligence they exercised in trying to discover it sooner. To prevent this statute from beginning to run against them in favor of defendants, complainants must not only allege, 1st: fraud and the facts or facts consisting it; 2nd: that these acts of fraud were committed by defendants or some one in privity with them; 3rd: that they were concealed from complainants by defendants or their privies; 4th: that complainants did not discover or know of this fraud over ten years before instituting their suit; but 5th, they must also allege and show that they exercised

reasonable diligence to discover it sooner, or that they could not with reasonable diligence, have discovered it sooner."

The bill was amended so as to conform to all of the above requirements fully and completely.

There is an express allegation in the Amended Bill that the plaintiffs in error had no knowledge of the concealed fraud or of their legal rights to the land "until within the last four or five years."

The facts establishing the concealed fraud were also fully set forth in the Amended Bill. In this respect, among other things it is alleged that one, J. J. Mc Caughan, who appears to have been the administrator of James McLaren, the defendant in execution at the marshal's sale, applied to the Circuit Court of the United States of Jackson, Mississippi, very soon after the death of John Martin, the purchaser at said sale, while the plaintiffs in error, the children of said Martin were "small and of tender years at the time and living with their mother in the City of New Orleans, Louisiana," and procured a certified copy of the judgment, execution and proceedings at said sale; and that a company was organized known as the Mississippi Land Company, which took charge of the lands, and concealed the facts of the said sale. (Trans., 41, 42; Rec., 68, 69.)

The Amended Bill further charges the defendants in error with knowledge of, and participation in, the concealed fraud and with full notice of the claim of title of the plaintiffs in error, and that they (the defendants in error) nevertheless accepted the gift of the lands. (Trans., 45; Rec., 73.)

In regard to diligence, the Amended Bill alleges "that just as soon as the facts of their father's purchase and ownership were made known to them" plaintiffs in error "at once set about to take all necessary lawful steps and to begin suit in order to establish their claim." The bill then proceeds to state in minute detail precisely what was done in this regard. (Trans., 42, 43; Rec., 69, 70.)

It is evident that the defendants in error considered that the Amended Bill conformed to the opinion of the Supreme Court, on the first appeal, in regard to the statute of limitations, for *they answered that part of the bill* denying the allegations of fraud. (Trans., 58, 59, 60; Rec., 91, 92, 93.)

The necessary effect of the answer is to eliminate the question of the Statute of Limitations from the case, even if the statute had been correctly construed on the first appeal, which we deny. For according to the opinion of the Supreme Court on the first appeal, the statute bars a proceeding which is not begun within ten years after the right of action accrues, *provided* that in the case of concealed fraud the time does not begin to run until knowledge of the fraud is obtained. When, therefore, an answer is filed by the defendants in error, denying any participation in or notice of the concealed fraud alleged by the plaintiffs in error, it admits that the allegations are well pleaded; but in order for the allegations to be well pleaded, they must show that knowledge of the concealed fraud was not obtained by the plaintiffs in error prior to ten years before they began the suit. The answer, therefore, denying fraud *ex necessitate rei* is

an admission that knowledge of the concealed fraud was not obtained by the plaintiffs in error prior to the ten years preceding the suit. In other words, the allegation in the Amended Bill of concealed fraud is affirmative matter in avoidance of the Statute of Limitations, if it should be held to apply (which we will show, however, by *Kennedy* v. *Sanders, supra,* is not the case). The denial of fraud by the answer puts in issue this affirmative matter in avoidance, and accordingly the ten years period of limitations passes out of the case. This leaves only the one remaining question to be considered on this writ of error and that is whether the plaintiffs in error acquired a valid title under the United States marshal's sale. It may be remarked in passing that the demurrer of the defendants in error contains grounds questioning the sufficiency of the allegations of the amended bill in respect to fraud. The result is an overlapping of defenses, and the demurrer should have been overruled, as the rule is, that if the same matter is covered to any extent by a demurrer and also by an aswer, the demurrer which is an entirety must be overruled.

Fall v. *Hafter,* 40 Miss., 606.
Pieri v. *Shieldsboro,* 42 Miss., 493.
Sledge v. *Dickson,* 81 Miss., 501.
Hentz v. *Delta Bank,* 76 Miss., 429.

But whether or not that question is reviewable in this court, in considering the question of fraud, that part of the demurrer must be treated as waived by the answer.

In connection with the Statute of Limitations, it

may not be inappropriate to state that there is no such defense as laches in Mississippi.

In *Cox* v. *Mortgage Co.*, 88 Miss., 88, in announcing this to be the law, the Supreme Court of Mississippi said (pp. 97, 98):

> "It is, however, too late in this state to insist upon any such defense. It surely ought to be known that that defense has been thoroughly disposed of by the cases of *Hill* v. *Nast*, 73 Miss., 862; 19 So. Rep., 707, and *Houston* v. *Building Association*, 80 Miss., 31 (31 So. Rep., 540; 92 Am. State Rep., 565). * * * We trust this court will never have to reiterate this proposition further."

It will be observed that in considering the allegations of the bill on demurrer the state court construed them most strongly against the pleader; but we submit that there is excellent authority which holds that on demurrer every reasonable presumption is to be extended in favor of rather than against the bill.

Lincoln v. *Purcell*, 2 Head. (Tenn.), 143.

And that a bill in equity will not be dismissed where a case proper for equitable relief appears, although defectively stated; for such construction will be given as will support rather than defeat the bill. Every reasonable presumption it is said is to be indulged in favor of rather than against the bill.

Anderson v. *Mullenix*, 5 Lea (73 Tenn.), 287, 289.

Kerr v. *Kerr*, 3 Lea (71 Tenn.), 224, 227.

The rules of pleading in chancery are not so precise and strict as at law and are more flexible in their modi-

fication and can be more readily made to suit the equity of the case and the policy of the court.

Brinkerhoff v. *Brown et al.*, 6 Johns Chancery (N .Y.), 139, 156.

Crane v. *Deming*, 7 Con., 386, 393.

Cornelius v. *Halsey*, 11 N. J. Equity, 27, 28.

Ransom v. *Geer*, 30 N. J. E., 249, 252.

1 Daniells Chancery (6th Am. Ed., star p. 362).

Quotations from two of the above cited cases will be sufficient to illustrate the rule announced.

In *Thompson* v. *Nance*, 8 Humph. (27 Tenn.), 114, the court said (p. 117):

> "It is true that the matter constituting the equity of the bill is inartificially stated, but the charge, we think, is fairly susceptible of the construction that the defendants had no legal title whatever to the tract of land which they sold and covenanted to convey to the complainants. It was manifestly so intended by the draftsman of the bill, and so understood by the counsel of the defendants. * * * Such construction will be given as will support rather than defeat the bill. * * *"

In *Kerr* v. *Kerr*, 3 Lea (71 Tenn.), 224, after stating that every reasonable presumption is to be made in favor of rather than against the bill, the court said (p. 227):

> "Treating the language of the bill as leaving the point in doubt whether the title was legal or equitable, the motion to dismiss was properly overruled. On the trial, the sheriff's return was introduced, showing that no personal property was found, and that the land was not levied on because encumbered by the judgment of Humbard. But the doubt is not necessarily removed thereby, and in the absence of any defense the court may still

> give the complainants the benefit of the doubt in furtherance of the ends of justice. *Thompson* v. *Nance,* 8 Humph. (27 Tenn.), 114, 116, 117."

In considering the allegations of concealed fraud in the bill, the length of time of concealment certainly cannot be construed as weakening the force of the allegation by casting doubt or suspicion upon it, but on the contrary, as was said in *Prevost* v. *Gratz,* 6 Wheat. (19 U. S.), 481, by Mr. Justice Story (pp. 497, 498):

> "In a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense and calls more loudly upon a court of equity to grant ample and decisive relief."

The decision of the state court on the first appeal on the question of the statute of limitation has been overruled in a subsequent decision.

We further maintain as an independent proposition, aside from the question whether the allegations of the Amended Bill and the answer thereto eliminate the question of the Statute of Limitations, that the subsequent decision of the Supreme Court of Mississippi in *Kennedy* v. *Sanders, supra,* 90 Miss., 524, 539, *overruling* that part of the opinion of the court on the first appeal construing the Statute of Limitations, as applied in this case, undoubtedly compels this court to hold that that part of the opinion of the state court on the first appeal was palpably erroneous and unfounded, and is wholly inapplicable to the present case.

In *Kennedy* v. *Sanders,* 90 Miss., 524, *supra,* it was

held that the Statute of Limitations does not apply except in case of adverse possession. The court said (the italics being ours), (p. 539):

"It is insisted by the learned counsel for the appellants that this suit is barred by Section 2730 of the Code of 1892, as interpreted in *Jones* v. *Rogers,* 85 Miss., 802, 38 Southern, 742. In that case, at pages 836 and 837 of 85 Miss., at page 747 of 38 Southern, the court said: 'that adverse possession of defendant has nothing to do with the question or with the operation of this particular statute. A complainant has a right to bring his suit in equity for land, whether he is in possession or not, and whether defendant is in possession or not; and if he does not bring it within the period of ten years after his right of action in a court accrues, he is barred.' This announcement has been challenged several times in recent cases, but we have never yet had presented to us the actual necessity for dealing with it. That necessity now confronts us. This *announcement was not necessary to the decision in Jones* v. *Rogers, for the court had already held that the complainants in that case had deraigned no title. That was decisive of the case and the opinion might well have stopped there.* After the most careful review of the question and of the general law and of the statute, we are constrained to and hereby do *disapprove and overrule this announcement of the law as unsound.* So many cases that come into this court based upon this declaration, that we feel that it is highly essential that it shall now be expressly overruled that it may no longer mislead. * * *

The illustrations which could be given of the disastrous consequences of considering the statute as it was considered in the dictum of *Jones* v. *Rogers,* are numerous, and occur at once upon reflection. This case furnishes a most pointed illustration. Here are the true and original owners of this land, which it is admitted in the pleadings on

> both sides is wild and uncultivated, and of which there is not a particle of proof that the appellants ever had actual adverse possession; and yet, if the plea set up here could be maintained as it might be if that decision on this point were sound, these true owners with a perfect, proper title which gave them constructive possession of the land are to lose their land by the mere flight of ten years' time, in favor of a tax purchaser at a sale, absolutely void for the want of any power to sell it, simply because such tax purchaser never had any adverse possession, and holding a deed void for want of power to sell at all, has not been proceeded against by such true owner. This cannot be the law. That is the construction of the statute would make it clearly unconstitutional, as depriving the citizen of his property without due process of law."

We do not think the proposition will be controverted that since the decision on the first appeal of the nonfederal question (the existence of which, however, on this present record we deny) has been subsequently overruled, this court would undoubtedly follow the overruling decision, and consider the question as having been erroneously decided in the first instance, should they hold that the present record did raise the question.

In *Johnson* v. *Risk,* 137 U. S., 300, the court stated the question thus (p. 307):

> "Was the defense of the Statute of Limitations so palpably unfounded that we must presume that the state court overruled it?"

In the present case, however, we are not forced to indulge in any presumption as to whether the decision on the first appeal on the Statute of Limitations was overruled, but are positively and expressly in-

formed in *Kennedy* v. *Sanders, supra,* that it was overruled.

In *Berea College* v. *Kentucky,* 211 U. S., 45, the court said (p. 53):

> "When a state court decides a case upon two grounds, one federal and the other non-federal, this court will not disturb the judgment if the non-federal ground, fairly construed, sustains the decision."

In the present case none of the defendants in error was in actual possession of the property for a period of ten years prior to the beginning of this suit. The Board of Supervisors of Harrison County went into possession under the deed of J. T. Jones, which is dated June 24, 1902. (Trans., 40; Rec., 66; Trans., 51.) But it is expressly alleged by the Amended Bill that until that time the land had never been in the "actual possession of any person or persons since the death of John Martin" (Trans., 40, 41; Rec., 66), which occurred in the year 1848. (Trans., 39; Rec., 63.) The present suit was commenced on the 5th day of February, 1903. (Trans., 9.)

On this showing it is clear under the decision of *Kennedy* v. *Sanders, supra,* overruling the decision in the present case on the first appeal, that the plaintiffs in error would not be barred by the Statute of Limitations, in any possible view of the case now before the court, even though they had knowledge of the fraudulent concealment of their title more than ten years prior to the beginnig of their suit, because the defendants in error had not been in adverse possession of the land for ten years prior to the commencement of the suit.

We submit, therefore, that the question of the Statute of Limitations has been removed from this case by either, or both, of the grounds that we have stated, namely, the answer of the defendants in error, and the overruling case of *Kennedy* v. *Sanders, supra.*

So that the record in the present case discloses only one question for the consideration of this court, and that is the federal question, whether the title of the plaintiffs in error acquired at the United States marshal's sale under the federal judgment is valid or invalid.

We are amply supported by authority in the position which we have assumed, notwithstanding that it might be held there is a non-federal question in the case which, however, as previously stated, we deny.

In *Johnson* v. *Risk,* 137 U. S., 300, the court said (p. 307):

> "Where there is a federal question, before the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on grounds clearly untenable. *Kilnger* v. *Missouri,* 13 Wall., 257. But where a defense is distinctly made resting on local statutes we should not, in order to reach a federal question, resort to critical conjecture as to the action of the court in the disposition of such defense.
>
> Was the defense of the Statute of Limitations so palpably unfounded that we must presume that the state court overruled it?"

In *Maguire* v. *Tyler,* 8 Wall. (75 U. S.), 650, the court said (pp. 664, 665):

> "The respondents do not deny that there are issues in the pleadings involving questions re-examinable in this court under that section of the Judiciary Act; but what they contend is that the answer presented other defenses not re-examinable in this court, and they insist that the Supreme Court of the state, for aught that appears to the contrary, may have decided the cause against the plaintiff, and reversed the decree of the Court of Common Pleas upon some of the defenses set up in the answer which are not re-examinable in this court. Certain it is that federal questions are directly involved in the pleadings and if it appears that none of the other defenses afford any legal answer to the suit, the conclusion must be that the case is properly here, as this court will not presume that the court below decided the other issues erroneously in order to defeat their own jurisdiction."

And continuing further the court said (pp. 667, 668):

> "The respondents also allege that some of their number were innocent purchasers, without notice, but the defense is not sustained by the proofs and there does not appear to be any foundation for the theory that the decree of the Supreme Court of the state was placed upon any such ground. Want of jurisdiction in the commissioners is also set up in the answer, and the argument is, that the Supreme Court of the state may have decided that the decree of confirmation was a nullity on that account. Unsupported, however, as the proposition is by anything appearing in the recorded proceedings of the board, it does not seem to be necessary to enter into any extended argument to show its fallacy. Suffice it to say that the question involved in the proposition is one which may be revised in this court and the proper answer to it is, that if

the court below so decided, the decision in our opinion was clearly erroneous."

In *Railroad Company* v. *Maryland*, 20 Wall. (87 U. S.), 643, it was held that:

> "Where on error to the Supreme Court of the state, the record shows a decision of the State Court on a federal question properly presented, and of which this court could take jurisdiction, and shows also the decision of the local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the federal question was erroneously decided."

To the same effect are:

Murdoch v. *City of Memphis*, 20 Wall. (87 U. S.), 590.

Berea College v. *Kentucky*, 211 U. S., 45, 53.

The authorities could be multiplied on this point, but we think the ones cited sufficiently illustrate the rule.

Applying the rule to the present case, and recapitulating to some extent, the record stands thus:

A case is presented where the actual judgment of the court to be reviewed contains neither an oral nor a written opinion. The duty then devolves upon this court to ascertain, first, whether there is a federal question and, second, to discover whether or not there is a non-federal question broad enough to support the judgment of the State Court. If there is, such a non-federal question, it must be considered for the pur-

pose of determining whether it has been fairly decided, or whether the decision was palpably erroneous or unfounded. In the present case the court will at once discover the question in respect to the marshal's sale and will, in our opinion, instantly hold that it involves a federal question. Then, the court will proceed to consider the opinion of the State Court on the first appeal in respect to their decision of the Statute of Limitations, and in this connection will consider the allegations of the Amended Bill conforming to the said decision and the answer thereto which eliminate that question. The court will also consider the case of *Kennedy* v. *Sanders* overruling the first decision. If the court are satisfied that the Amended Bill and the answer remove the non-federal question from the record, then, of course, there is nothing left but the federal question. If, however, they should be of the opinion that the non-federal question still exists on the pleadings, notwithstanding the Amended Bill and answer, then it is their duty to consider and decide whether that question forms or presents such a proposition as will constitute a basis for the judgment of the State Court, which would stand as a bar, and which on a sound judicial construction would furnish an independent and separate ground sufficient to support the judgment of the State Court. If the decision of the non-federal question by the State Court were clearly erroneous, as must be the case where it is overruled by a subsequent decision, then this court would assume jurisdiction of the federal question and decide it according to its own conceptions of the general law. If, on the other hand, the court should not consider the opinion of the State Court on the first appeal, then,

since there was neither an oral nor a written opinion on the second appeal (from which this writ of error is prosecuted) the court cannot hold in this case, as in those where there is an opinion which expressly appears to have been based upon both a federal and a non-federal question, that the judgment of the State Court on the second appeal rested on a non-federal question. For in the absence of a decision or opinion of the State Court disclosing the grounds of its judgment, the record must be searched to ascertain whether there is a substantial non-federal question in the case which, fairly construed, would sustain the judgment of the State Court. This is essentially a different inquiry from that where the State Court has, in express terms, decided a non-federal question which goes in bar to the whole case and which constitutes in fact a separate and independent ground of the judgment. In such a case, this court would not review the non-federal question merely to determine from an independent investigation whether it was correctly decided by the State Court, but would only examine it for the purpose of ascertaining whether, if fairly construed, it would support the judgment of the State Court. Now, if the judgment of the State Court is considered on the present record without the assistance of the opinion on the first appeal, what is the situation which confronts this court? The averments in the Amended Bill must be admitted in fact for the purposes of the demurrer. And these allegations, together with the answer, eliminate the question of the Statute of Limitations. Conceding these allegations to be true, could the question of the Statute of Limitations possibly be im-

puted by this court to the State Court as the ground of their decision? This would be to impute to that court an erroneous and unsound decision of the question of the Statute of Limitations. This court must, therefore, *ex necessitate rei,* decide for themselves as an independent proposition whether the question of the Statute of Limitations, correctly decided upon sound legal principles, could properly be made the ground of the judgment of the State Court; and when the attention of this court is called to the subsequent decision of the State Court expressly overruling their previous construction of the Statute of Limitations on the first appeal in this case, this court must certainly hold that the Statute of Limitations has not barred the claim of the plaintiffs in error. *To decide otherwise would involve the assumption that the State Court had* first *improperly considered a question not raised on the record* and, second, *had rendered a grossly erroneous decision of the question.*

In respect to the federal question, however, it will not be presumed, under the general affirmance on the second appeal, that it was decided differently than on the first appeal, since the pleadings in both cases in that regard present substantially the same case. The federal question constitutes the ground of the whole action. On the general order of affirmance, therefore, the ground of the judgment which should be imputed to the State Court, is the decision of the federal question which was presented by the same pleadings on both appeals and not the non-federal question which did not arise on the pleadings on the second appeal. In other words the judgment of the State Court

should be assumed to have been based on the federal question, and that any decision on the non-federal question was pretermitted on the second appeal, since the federal question embraced the entire claim of the plaintiff in error. Again, assuming that there is doubt as to which of the two questions the judgment of the State Court is based upon, then since the federal question *clearly* appears in the case, the jurisdiction of this court assuredly will not be defeated on the theory that there is *uncertainty* as to whether the judgment of the State Court may not have been based on another ground.

Finally, we submit that even if it should be held that the judgment of the State Court rested on both questions (which in our opinion is an impossible supposition on this record) and that the State Court decided on the second appeal that the federal right has been lost because of the Statute of Limitations, we submit that the denial of the federal right is so interwoven with the other question, that this court, in order to protect the claim of plaintiffs in error under federal authority, must decide, first, whether their claim is valid and then whether it has been lost or barred by the Statute of Limitations; and, as the latter question depends upon the question of adverse possession, it would necessarily be involved in the determination of the question of title.

When there has been no adverse possession, the true owner is not barred by the ten years Statute of Limitations.

Kennedy v. *Sanders*, 90 Miss., 524.

And mere adverse possession alone is not sufficient to defeat the title of the true owner; it must be shown that the true owner knew the adverse party claimed in his own right, or that his possession was so open and notorious as to raise the presumption of that claim.

Dothard v. *Denson,* 72 Ala., 544.

It will be perceived that the question of adverse possession which arises on the question of the Statute of Limitations would be dependent upon the preliminary determination of the disputed claim of title between these claimants.

If the question of the Statute of Limitations should be considered it should be borne in mind that on demurrer, the bill would only be dismissed when it clearly appears that the equity of plaintiff in error is barred.

Lincoln v. *Purcell,* 2 Head (Tenn.), 143.

In *Maguire* v. *Taylor,* 8 Wall. (75 U. S.), 650, the court said (pp. 664, 665):

> "Respondents pleaded the Statute of Limitations, that they and those under whom they claim had been in the actual, adverse and continuous possession of the premises for more than twenty years next before the commencement of the suit. Such a defense could not have been adjudged good in this case without a direct denial of the foundation of the plaintiff's claim, as will be readily seen by brief reference to the facts."

But as a matter of fact we maintain that no question of adverse possessions and therefore no question of the Statute of Limitations, can arise in this case according to the decision in *Kennedy* v. *Sanders, supra,* because the Amended Bill alleges that the land was never actually occupied since the death of John Martin, until

the board of supervisors, defendants in error, took possession in 1902. (Trans., pp. 40, 41,; Rec., 66.)

III.

THE ALLEGATIONS IN THE AMENDED BILL SHOW THAT THE SALE OF THE LANDS IN CONTROVERSY BY THE UNITED STATES MARSHAL, UNDER A JUDGMENT OF THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, WAS VALID AND CONFERRED TITLE UPON JOHN MARTIN, THE PURCHASER AT SAID SALE, THROUGH WHOM THE PLAINTIFFS IN ERROR CLAIM TITLE TO THE LAND.

We have now arrived at the merits of the controversy and the question presented is whether the marshal's sale, upon which the title of the plaintiffs in error depends, was valid or invalid. As heretofore stated, this issue arises solely on the demurrer to the Amended Bill.

The grounds of the demurrer which attack the validity of the marshal's sale are as follows:

> "1st. That upon the facts alleged in the said bill and exhibits, the said John Martin did not, by virtue of the said alleged sale by the said United States marshal, acquire either the legal or equitable title to said land.
>
> 2nd. That the said alleged sale by said marshal on the 28th day of October, 1839, in front of the state house in Jackson, was not made at a time or place fixed by law for making such sales, and that the said sale to said John Martin was void, and carried neither title nor the right to title."

In arguing the present question we shall not now consider the opinion of the State Court on the first appeal holding that the marshal's sale was void, but shall re-

serve our discussion of that decision until later in the argument.

At present, we shall discuss the question as an independent one and shall attempt to determine it on the principles of general law.

Where a federal question is presented "the duty of this court to apply to such question its own conceptions of the general law, we think, is incontrovertible."

Tulloch v. *Mulvane,* 184 U. S., 497, 503.

We would preface our discussion of the question with the statement previously made that, in our opinion, the sounder and better authority sustains the rule that on demurrer every reasonable presumption is to be extended in favor of rather than against the bill.

Lincoln v. *Purcell,* 2 Head., 143.
Brinkerhoff v. *Brown et al.,* 6 Johns. Chancery (N. Y.), 139, 156.
Crane v. *Deming,* 7 Conn., 386, 393.
Cornelius v. *Halsey,* 11 N. J. E., 27, 28.
Ransom v. *Geer,* 30 N. J. E., 249, 252.

A bill in equity will not be dismissed where a case for equitable relief appears, although defectively or inartificially stated; for such construction will be given as will support rather than defeat the bill.

Thompson v. *Nance,* 8 Humph., 27 (27 Tenn.), 114, 117.
Kerr v. *Kerr,* 3 Lea (71 Tenn.), 224, 227.
Anderson v. *Mullenix,* 5 Lea (73 Tenn.), 287, 289.

The statutory provisions in respect to marshal's sales, which would govern the present sale, are sub-

stantially as follows: Section 3 of Act of Congress approved May 19, 1828, which provides:

> "That writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States and proceedings thereon shall be the same * * * in each state respectively as are now used in courts of such states * * *."

Section 4 of a special Act of Congress, approved February 16, 1838, which provides, as follows:

> "That the marshal of the several districts of the state of Mississippi, in addition to several days now allowed by law, may be authorized to sell property at the court house in each county on Monday of each week, and on the first and second days of each term of the District Court; and he may, at the written request of the defendant, change the sale of property to the place where the United States Court for the District is holden; provided in the opinion of the marshal the interest of the plaintiff is not compromised thereby."

The Mississippi statute prescribed that all sales of land should be made at the court house of the county, and on the first and third Mondays of each month.

The Amended Bill shows that these statutory requirements were complied with.

It states that the sale was made on the 28th day of October, 1839, before the front door of the state house at the capitol of Mississippi, at Jackson, Mississippi, where the United States Circuit Court was then held, and that said sale was conducted in all respects according to law. (Trans., 38; Rec., 63.)

It further alleges that the sale was made at the *written request* of the defendant, James McLaren. (Trans., 39; Rec., 64.)

It further avers that the sale was made by the United States marshal, Wm. M. Gwyn. (Trans., 39; Rec., 63.)

It is alleged on belief that a deed was executed by the marshal and was filed in Hancock (now Harrison) County, but was destroyed when the court house was burned. (Trans., 40, 41; Rec., 65, 67.)

The land is fully described in the bill and alleged to be situated in the town of Gulfport, County of Harrison, and State of Mississippi. (Trans., 38; Rec., 61; Trans., 40; Rec., 66.)

We do not think that it will be denied that the allegations of the bill in the matters stated are sufficient. But we assume that defendants in error will renew their contention, made in the state court, that the allegations of the bill are contradicted by the marshal's return, which is made an exhibit to the bill, and that according to the rules of pleading the recitals in the return will prevail.

The specific objections urged to the return in the state court were as follows:

(1) That the land was insufficiently described because the return failed to show the county or state in which the land was situated.

(2) That the sale was not made at the place prescribed by law.

(3) That the signature to the return was not signed by the U. S. marshal, but by "Wm. M. Gwyn, marshal, per F. S. Hunt."

(4) That neither the return nor the Amended Bill alleged that a deed was made by the marshal.

The third objection, namely, the one to the signature of the return, was referred to by the state court in the opinion on the first appeal, but was not decided, as will appear later, the decision of the court being based on the other objections.

The return is, in substance, as follows, the parts which we have italicised embracing the lands in controversy. (Trans., p. 49):

> "Levied this execution, together with others, viz.: Samuel Hildebum, Young, Smith & Company, Martin Pleasants & Company, R. H. Osgood & Company, Seaman & Ward, Graniss & Brothers, against McLaren & Hammond and sureties on the following lands, viz. (Here follows the description):
>
> The undivided interest of one-half of the last described tracts, and after having duly advertised the said lands they were offered for sale in the City of Jackson, at the front door of the state house, on the 7th day of October, 1839; the defendants having consented in writing that said sale should take place in Jackson, when the first described tract, to-wit: 615 43/100 acres on the Mississippi River, was knocked down to William C. Demoss at the price of $6,000; the second and third tracts, consisting of 961 48/100 acres on Deer Creek, in Washington County, was struck off to Quillam Burns at the price of $3,800; the fourth tract, consisting of 319 80/100 acres, in Madison County, was struck off to Charles M. McLaren, at the price of $300, and the 5th, consisting of defendant's interest in Lot No. 3, Sec. 12, Tp. 5, Range 1, East, near Jackson, was struck off to James Roach for the sum of $340, and all the balance was sold to Charles McLaren for $1,435; the said Demoss, Roach and McLaren being respectively the highest, last and best bidders for this execution, together with others mentioned above, were also levied on the following described

tracts of land, to-wit: *Sections* 35 *and* 36, *in Tp.* 7 *S., R.* 11 *West, and fractional sections* 1, 2, 3, 8, 9, 10 *in Tp.* 8 *S., R.* 11 *West, all lying on or near the sea shore, in the vicinity of Mississippi, which said lands, after having been duly advertised, were sold in Jackson on the* 28th *day of October, A. D.* 1839, *to John Martin, for the sum of* $760, *he being the highest, best and last bidder.*

Wm. M. Gwyn, *Marshal,*
Per F. S. Hunt."

It is difficult to understand on what theory it can be said that the return and the allegations of the bill are contradictory in the matters above stated. A comparison fails to disclose any contradiction whatever. The bill makes positive, definite allegations as to the county and state in which the land was situated; the place of sale; that the sale was made by the United States marshal; and on belief that a deed was executed. The return contradicts none of these allegations. It is true that it does not recite the county and state in which the land was situated, and after naming the fractional sections does refer to the land as "lying on or near the seashore, in the vicinity of Mississippi;" also, that it does not state the specific place in the town where the land was sold, but only recites that it was "sold in Jackson;" further, that it does not state that the sale was made by the marshal, but it is, in fact, signed, "Wm. M. Gwyn, *Marshal,* per F. S. Hunt;" and, lastly, that it does not state that a deed was executed by the marshal. In other words, it simply omits to make full and complete statements in these respects, and these omissions or defects are supplied by the specific allegations in the Amended Bill. In other words, the allegations of the Amended Bill do not contradict the return, but merely supple-

ment it. This so readily appears from even a superficial inspection that we are compelled to express surprise that a contrary view could be entertained. Of course, if the return had alleged a sale at some specific location "in Jackson," different from the place in Jackson alleged in the Amended Bill, then a contradiction could be claimed. Or, if the return alleged another county or state from that averred in the Amended Bill, there would be a contradiction. But the mere fact that it used the word "vicinity," which was undoubtedly a clerical error or an ignorant use of the word, would not be sufficient to support an objection that there was a contradiction.

Again, the fact that the return does not purport to have been signed by the marshal himself, is not a contradiction of the allegation of the Amended Bill, that the sale was made by the marshal.

Finally the failure of the return to recite that a deed was made by the marshal cannot be construed as a contradiction of the allegation of the Amended Bill on belief that a deed was made.

In order for a contradiction to exist between a bill and an exhibit, there must be a clear conflict on some matter which is definitely stated in each in such a different way as to involve a direct inconsistency, and to be irreconcilable.

In *Holman* v. *Patterson*, 29 Ark., 357, although the complainant averred that certain persons *were made parties to a suit*, he sought to have this averment contradicted by an exhibit to his bill consisting of an original bill and an exhibit in a former suit, which *did not show service on said parties*, but the court

refused to consider the exhibit for this purpose on the ground that it was imperfect and did not *affirmatively* show that the persons were not made parties to said suit. In this regard the court said (p. 363):

> "Patterson insists here because the imperfect record exhibited of the bill does not show service on Woodruff & Brewer, that Noonan and Patterson are not bound, because they were not bound, and that they are not purchasers *pendente lite*, because these vendors were never parties. Both Noonan & Patterson bought after Holman filed his bill. Patterson avers that Woodruff and Brewer were made parties and a decree *pro confesso* was entered against them. If, in point of fact, Brewer never had notice, Patterson should have so averred and his right to review would have been clear. We cannot look from plaintiff's bill to the exhibit which on its face shows that it is imperfect, and is only exhibited to show the original bill and decree and for the purpose of contradicting his allegations, especially when, as in this cae, we are asked to infer a fact, from the omissions in the exhibit. While it is true, a fact affirmatively and distinctly appearing in an exhibit would extend and supply defective allegations in a bill, we cannot extend the rule, as asked here, when the whole gravamen of the bill is based upon a different hypothesis, and the allegation is not only not made, but is inferentially contradicted by the bill."

In *Freiberg et al.* v. *Magale*, 70 Tex., 116, where the question whether an exhibit contradicted a bill was considered, the court said (p. 118):

> "It is claimed by the appellants that the demurrers were properly sustained; first because the petition does not allege and the exhibit does not show that, after the instrument was executed and acknowledged, it was forthwith deposited in the office of the County Clerk of Galveston County.

The petition does allege, as we have seen, that on the day after the execution of the mortgage, it was deposited with the County Clerk of Galveston County, to be kept among the chattel mortgages. This is what the statute requires to be done in order to give such an instrument validity as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees or lien holders in good faith. (*Brothers* v. *Mundell*, 60 Tex., 246.) It is true that the copy attached to the petition does not contain an indorsement as to the filing of the mortgage; but it was not attached in verification of the allegations of the petition as to such filing, but to sustain the allegations as to the contents of the instrument. The petition avers that a mortgage containing certain stipulations was executed by Owens and refers to the exhibit to establish the averment; it then alleges that the mortgage was deposited with the clerk the next day after its execution, but makes no reference whatever to the exhibit to sustain this allegation. The mortgage sustains the allegation as to its contents. Had it contradicted or been inconsistent with them, the exhibit and not the pleading would control. It was not appealed to for the purpose of showing what was done with the mortgage after it was executed, and hence its absence of any indorsement as to its filing does not disprove the averment of the petition as to its being properly deposited with the county clerk."

In *Hand & Huddleston* v. *Grant*, 5 S. & M. 13 Miss.), 508, 513, in which a return described property sold on execution as "Lots 4 and 5 in Square 1, South of Main street, Columbus," the court considered an averment in the declaration "that the sale was made by the plaintiff below as sheriff as the door of the court house of Lowndes County, Columbus, and that the lots sold were situated in said town of Columbus," in connec-

tion with the return in order to ascertain the identity of the property. In that case it was not suggested or intimated that there was any contradiction between the declaration and the return.

It must be borne in mind, in considering the bill and the return that the return is not the basis of the title of the plaintiffs in error, as will appear later from the authorities, and that the bill is not founded on the return. The judgment, levy and sale make the *prima facie* case of the plaintiffs in error, and the return is only referred to and made an exhibit to the bill as one of the evidences of the levy and sale. It is not conclusive of the levy and sale, but only *prima facie* evidence thereof; and the title of the purchaser is not dependent upon it. Even if it were absent entirely the purchaser's title would not be defeated.

Again we repeat that the return was not, and could not have been legally, made an exhibit for the purpose of supporting, by itself alone, the claim of plaintiffs in error, but was referred to only as a fact or circumstance evidencing the levy and sale; and when used for that purpose, a court of equity would certainly require a clear and convincing contradiction between it and the allegations of the Amended Bill, before the court would disregard the allegations of the bill and look only to the recitals in the return.

We are confident that on a fair, rational interpretation of the Amended Bill and the return, the allegations of the bill are not contradicted by the return and must, therefore, be given their full force and effect.

The question then remains whether the omissions and

defects of the return are sufficient to invalidate the title of the plaintiffs in error.

According to the overwhelming weight of authority, the title of a purchaser at a sale under an execution does not depend on the return or any informality or irregularity therein; and even the absence of the return will not affect his title. Furthermore, parol evidence is always admissible to correct or explain the return. And the rule must apply with greater force to the present proceeding which involves a collateral attack on the return.

In considering the return, it may be stated generally that no statutory form is required and no precise technical language.

In *Hamblen* v. *Hamblen,* 33 Miss., 455, the court said (pp. 461, 462):

> "Our statute has no provision which declares that the sale shall be void unless the sheriff returns on the execution the property levied on and sold. The omission therefore to do so would be merely one of those irregularities which, according to all of the authorities, will not vitiate the sale made under it. This doctrine is well sustained by authority."

In *Bacon* v. *Bevan,* 44 Miss., 293, in considering the return of the sheriff on a summons, the court said (p. 295):

> "We are not inclined to indulge nice criticisms of the words used by the sheriff in describing the act done. If it can fairly be inferred from his return that he met the requirements of the law, it will suffice."

In *Whittlesey* v. *Starr,* 8 Conn., 134, in which the re-

turn on an execution was considered, the court said (p. 137):

> "I admit that it does not *necessarily*, thus appear, in exclusion of every possibility to the contrary; but by a rational construction of the officer's return, there is no doubt that the requisite act does appear. The return of an officer ought ever to receive a reasonable intendment and construction; and where it is susceptible of different meanings, that should be adopted which is most conformed to his legal duty. *Booth* v. *Booth*, 7 Con. Rep., 350. When, therefore, it is returned upon an execution that the appraisers were appointed by the next justice of the peace capable of judging between the parties both of whom lived in the Town of Danbury, where the land in question lay, it is a reasonable construction that by this *periphrasis* the officer intended the same as if he had said that the justice dwelt in the aforesaid town. This construction assumes the principle that the officer did his duty, which is a most reasonable intendment, until the contrary is made to appear. It is the more reasonable as if this were not the fact, it was competent for the defendant to prove it; and it would have been proved by him, as the proof could be attended with no possible difficulty."

In *Jones* v. *Meyer Bros.*, 25 Tex. Civil App., 234, the court said (pp. 236, 237):

> "It is contended that the sheriff's return on the execution is insufficient, for the reason that the manner in which the levy was made is not shown. * * * But the statute does not prescribe any form of return and does not provide that the return shall show the manner in which the levy was made. Thet return will be liberally construed and the presumption that the officer did his duty will be indulged. *Miller* v. *Alexander*, 13 Tex., 503; Murfree on sheriffs, Sec, 839 A. In this case the return shows that the writ was levied and the

presumption is that it was levied in the manner prescribed by law. * * *

The title of the purchaser at execution sale does not depend on the return and any informality or irregularity therein will not affect his title. *Fitch* v. *Boyce,* 51 Tex., 344."

In *Reinhardt* v. *Kennedy,* 106 Ill. App., 96, the court said (p. 97):

"Ordinarily, it is presumed that the sheriff or constable making a return of a writ intended to make a legal return and if the language used by him in such return fairly admits of a construction which will make his return legal and sufficient, it should be so construed."

In *Byer* v. *Etnyre et al.,* 2 Gill (Md.), 150, 158, 159, in which it was held that the title of a purchaser at an execution sale is not dependent upon the officer's return; also that there is no precise form of return prescribed by law; and that seizure is a matter in *pais* which may be proved by parol evidence.

Title of Purchaser Does Not Depend on Return.

It is so well settled by almost universal authority that a purchaser at a sale under an execution cannot be divested of his title by a defective return by the sheriff, that we apologize for quoting at length from the authorities and our only excuse for so doing is that, apparently, either the rule was doubted by the State Court or else the postion of the plaintiffs in error was misunderstood.

In *Wheaton* v. *Sexton,* 4 Wheat. (17 U. S.), 503, the court said (p. 506):

"On this point the court can only express its surprise that any doubt could be entertained, the

purchaser depends upon the judgment, the levy and the deed. * * * Whether the marshal sells before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued and the levy made before the return."

In *Minor* v. *The President and Selectmen of Natchez*, 4 S. & M. (12 Miss.), 602, the plaintiff brought an action of ejectment for land to which he claimed title as the purchaser at a sale made by the United States Marshal of the Southern District of Mississippi. In his return the Marshal certified that he offered the land at public sale and had given legal notice of the sale in "a public newspaper called the Courier, published in the City of Natchez." The alleged defect in the sale consisted of the advertisement having been made in a newspaper instead of by posting in five public places. The court said (p. 621):

"As the law then required the sheriff to advertise by posting up the notices in five public places, it is clear, from his return, that he has committed an irregularity by departing from the laws, unless he acted on the request of the defendant. It was said in argument, and very truly, that to advertise in a newspaper is not necessarily a violation of the law, it is the proper mode when the defendant requests that the sale should be so advertised; and on this account the propriety of the decision in ruling out the return, might well be questioned, the plaintiff having been prepared to support the return by the proper evidence of a request made by the defendant; but we pass that by and proceed to the more important question. Does this irregularity of the Marshal vitiate his sale? It is not pretended that there was any defect in the judgment, or in the execution. * * * The law does not impose it

as a duty on purchasers to look into the regularity of the judgments and executions under which they purchase. * * * If the law will not vacate a sale made under an irregular judgment, it would seem to follow as a legitimate consequence, that it will not void a sale for an irregularity of the sheriff. The policy of sustaining the sale must be as strong in one case as in the other. Indeed, there is a stronger reason why the irregularity of the sheriff should be disregarded; the injured party has his remedy against the sheriff; whereas he is without remedy in case the judgment be irregular. The sheriff, being the created officer of the law, is presumed to act in obedience to law, and the community has a right to rest upon the presumption that he acts correctly, and the law sustains rights acquired under that presumption. He derives his authority to sell, from the judgment and execution, not from the advertisement. The purchaser is not put upon inquiry as to the regularity of the judgment and execution. In the official character of the sheriff, and his general power derived from that character, purchasers have a guarantee that they will be protected in their title. If this law is to be so construed as to defeat a sale for the irregularity of the advertisement, the object of the law requiring public notice to be given, is defeated. Property will never command its value, when the purchaser's title is to depend upon the regularity of the notices of sale. * * *

If the sheriff should happen to return that he had given proper notice, this would not mend the matter. The counsel for the defendants in error has insisted that the recitals in the deed are not evidence, and as cited authorities which sustain that position. The sheriff's return would not be conclusive evidence, even if he was bound to certify in his return that he had given the requisite notices, but he is not. * * *

These consequences are serious, and must show that to hold a sale void, because of an irregular-

ity, in the officer, without an express authority for so deciding, would come in conflict with that policy in the law which protects *bona fide* purchasers at sheriffs' sales."

In *Doe* v. *The Natchez Ins. Co.*, 8 S. & M. (16 Miss.), 197, in considering a sheriff's sale, the court said (p. 205):

> "Mere irregularities in the judgment or execution cannot be collaterally inquired into."

In *Cockerel* v. *Wynn*, 12 S. &. M., (20 Miss.), 117, an action of ejectment was brought for land purchased at a sheriff's sale and it was urged that the execution was void because it issued on the original judgment after a forthcoming bond had been forfeited. The court said (p. 123):

> "This objection is not sustained by the facts disclosed by the record. A levy was made on the land under the execution which issued on the bond before the sale was suspended under the valuation of the law. A *venditioni exponas* afterwards issued, under which the sheriff sold. This is the only process set out. The due issuance of the preceding executions was admitted by the parties. The *venditioni exponas* does not seem to be defective, but even if it were irregular, and liable to be quashed, such irregularity does not affect the purchaser under it. Mere irregularities either in the judgment or execution, present no obstacles in the way of the purchaser; they cannot be collaterally inquired into."

In *Stevenson's Heirs* v. *McReary*, 12 S. & M., (20 Miss.), 9, in which a title acquired by a judicial sale was objected to, the court said (p. 54):

> "A *bona fide* purchaser at sheriff's sale looks to the validity of the judgment; he must know that the court had jurisdiction of the subject matter and of the person; he is not affected by

the irregularities of the sheriff in making the sale."

In *Hamblen* v. *Hamblen,* 33 Miss., 455, the court said (pp. 461, 462):

> "The title of 'the purchaser depends upon the judgment, the levy and the sale;' and in all cases in which titles derived under execution are upheld, the court proceed on the presumption that there was a levy of the execution. * * * The decisions upon this subject are based upon the policy of the law to encourage purchasers at execution sales, who would be deterred from buying, to the detriment both of the debtor and creditor, if sales made by an officer of the law and appearing to have been conducted in conformity with its requirements should be void on account of some irregularity which could not be known at the time; and also upon the general principle of reposing faith in the acts of ministerial officers."

In *Duke* v. *Clark,* 58 Miss., 465, the court said (p. 473):

> "It was admissible for the plaintiffs to show that the three executions in the hands of the sheriff were levied on the land, and that it was sold under the third, although there was no indorsement of a levy on any of them except one. The failure of the sheriff to make the proper return on the executions did not affect the right of the purchaser, and the fact that the purchaser owned the judgment executed made no difference in this respect. His right depends on what was done and not on an omission of the officer to return a correct statement of it."

In *Quarles* v. *Hiern,* 70 Miss., 891, in which a sale of land on execution was attacked on the ground that it was not properly advertised, the court said (p. 891):

> "It does not appear that Quarles, who, at the execution sale, became purchaser of a part of the

land, had any notice of the irregularity of the published notice of sale. The complainant avers that, at the sale, he caused notice to be given that the judgment under which the officer was proceeding was invalid, and that the sale would therefore be contested. But there is no suggestion, either in the pleadings or evidence, that objection was made because of any irregularity in the publication of the notice of sale, or that Quarles had any notice of such irregularity. Under such circumstances, he was entitled to act upon the assumption that the officer had discharged his duty in making the publication, and, though irregularities may have existed in the publication of the notice, his title acquired at the sale cannot be affected."

In *Cornett* v. *Williams,* 20 Wall. (87 U. S.), 226, 249, 250, it was held that where a County Court having jurisdiction to authorize a sale of a decedent's estate for his debts, does authorize it and the sale is made, the sale must be presumed in this court to have been regularly made; and every intendment is indulged to support the proceeding; and that in the absence of fraud, the question of its propriety is not open to examination otherwise than in an Appellate Court in a proceeding had directly for that purpose.

In *Preston* v. *Wright,* 60 Ia., 351, where the statute (Sec. 4041, Annotated Code of Iowa, 1897, p. 1611), directs that in a sale on execution, the property shall be appraised and that one of the appraisers shall be chosen by the execution debtor and one by the plaintiff, or, in case of the absence of either party, the officer making the levy shall choose one or both, the Supreme Court said (p. 354):

"It appears that the plaintiff appointed one appraiser of the property and the sheriff appointed one. The return does not show that the

defendant was absent, only that he refused to appoint an appraiser. It is claimed that this vitiates the sale. * * * Although this exact question was not involved in *Cavender* v. *Heirs of Smith*, only in *Hill* v. *Baker, supra*, yet it results from the principles approved in those cases that the failure of the sheriff to return that the execution defendant was absent, or refused to appoint an appraiser, will not render the sale void."

In *Beattie* v. *Robin*, 2 Vt., 181, in which a sale was attacked as irregular because of an imperfect and irregular return of the officer, the court said (p. 184):

"The officer might have returned where the sale was holden, and the amount of charges deducted from the avails of the property and shown the balance left due on the execution; but it is not absolutely necessary that the return should show the place of sale; it is sufficient that there was a time and place appointed in the advertisement; and when the contrary is not made to appear, it will be presumed the advertisement was legal, especially when we see that both debtor and creditor attended and requested an adjournment."

In *Johnson* v. *Carson*, 3 G. Gr., 499, 500 (Iowa), the court said (p. 500):

"The record in the case shows conclusively that there was a valid judgment, execution, levy and sale under appraisement. These were all that the purchaser needed at law to justify and confirm his title; consequently, proof of the irregularity in those objects themselves would not be competent to impair or invalidate his title."

In *Davidson* v. *Chandler*, 65 S. W. (Tex.), 1080, the court said (p. 1080):

"The title of the purchaser does not rest upon the entry of the levy. All that he is required to do is to show a valid judgment, execution and

sale. * * * Parol evidence was admissible to show the clerical error in the return."

In *Phillips* v. *Coffee,* 17 Ill., 154, 156, it was held that a purchaser's title at a sheriff's sale cannot be defeated by a defective return or even no return at all.

In *Stribling* v. *Prettyman,* 57 Ill., 371, which was an action of ejectment, where the plaintiff claimed under a sheriff's sale, an objection that the sheriff's return upon the execution failed to show a sale was overruled. The court said (p. 377):

> "Defendant in error claimed title under a sheriff's sale. He need only produce the judgment and execution, to entitle the deed to be admitted. A title cannot be defeated by the neglect of a sheriff to make a proper return."

In *Camp* v. *Smith,* 98 Ind., 409, the court said (p. 411):

> "It is also insisted that the return to the execution does not sufficiently describe the real estate levied upon as it failed to state in what county it is situated. The execution was directed to and returned by the sheriff of Warrick County, and it must be presumed that the land levied upon was in that county, because the sheriff could not levy upon ground outside of his county."

In *Randolph* v. *Carlton,* 8 Ala., 606, the court said (p. 614):

> "The sheriff, it must be supposed, did his duty and as he was commanded to attach the defendant's estate, it will not be presumed that he levied upon the property of another person."

Description of Property in the Return.

In the present case the marshal's return locates the lands as follows: Sections 35 and 36 in Township 7

S., Range 11 West, and fractional Sections 1, 2, 3, 8, 9, 10 in Township 8 S., Range 11 West, all lying on or near the seashore in the vicinity of Mississippi.

An inspection of a township map of Mississippi would show the exact location of these sections and townships, and such extrinsic evidence would undoubtedly be admissible.

All that is required in the description of a sheriff's return or deed is that it will be sufficient to enable the property to be identified and if there is doubt as to the identity of the land, parol evidence is admissible to render it certain.

In *Hand & Huddleston* v. *Grant*, 5 S. & M. (13 Miss.), 508, 511, 512, in which the sheriff's return of a sale on an execution was objected to on the ground that the description of the property sold did not sufficiently describe the property, the court said (pp. 512, 513):

> "In the levy the sheriff has described the property as 'Lots 4 and 5 in Square 1, South of Main Street, Columbus' and the return proceeds 'advertised and sold according to law, 16 March, 1840, to Hand & Huddleston for $3,005.' The declaration avers that the sale was made by the plaintiff below as sheriff, at the door of the court house of Lowndes County, in Columbus, and that the lots were situated in said town of Columbus. It is a sufficient description of town lands, to give the number of the lot, and the number of the square in which it is situated, as designated in survey or plat of the town. These lots were described by their appropriate numbers and the numbers of the square in which they were situated and also by the street. Assuming that this description was made with reference to the survey of the town, it was sufficient. That it was so made there is no room to doubt, as in that way only

can we account for their numbers, and the number of the square in which they were situated."

In *Peacher* v. *Strauss et al.*, 47 Miss., 353, in which a deed was objected to on the ground that it described the land as being "Lot No. 5, South, in the Town of Jackson," without naming the *county* or *state*, in deciding that the defect in the description could be supplied by parol the court said (p. 361):

> "Looking through the authorities it will be seen that, under every conceivable state of facts, and in every imaginable circumstance the cases may be counted by hundreds if not by thousands, where contracts, wills and deeds are made effective by the identification by extrinsic evidence, of the person or subject intended."

And on page 366, the court said (the italics being ours):

> "We conclude upon general principles, as enunciated by modern authorities and sustained by sound reason, that *extrinsic evidence* of the *county* and *state*, as proposed by the plaintiffs on the trial, ought to have been admitted, in aid of the description of the land mentioned in the deed and claimed in the suit, in view apparently of other means of local identification."

In *Smith* v. *Low*, 24 N. C., 457, in considering the sufficiency of the description in a sheriff's return of sale, the court said (p. 460):

> "It was held that a constable is not bound to describe the land returned by him to the County Court as levied on, precisely according to the directions of the statute; that it is sufficient if he gives such a description as will distinguish and identify the land."

The description in the return was as follows:

> "Three tracts of land, the home place, the

> Lynn and the Leonard Greeson place, containing 400 acres be the same more or less * * * and belonging to Julius Coley."

On the question of admitting parol proof to aid the description, the court said (p. 460):

> "Proof *aliunde* is requisite to apply the description to a particular thing; and when so applied the inquiry results, does the thing answer the description, so far as to satisfy an official mind that this particular parcel of land is that meant? This extrinsic evidence may be of various kinds as by showing that certain actual objects call for, or certain courses and distances and corners, or the lines of other tracts are known and upon survey are found to correspond with the description in a deed or levy."

In *Randolph* v. *Carlton,* 8 Ala., 606, the description in the sheriff's return was as follows:

> "Levied on one tract of land adjoining the lands of Ira Carlton, Mrs. Gray and others, containing 200 acres, more or less."

This description was objected to as being insufficient. The court said (p. 614):

> "In the case before us the judgment was returned and levied" on one tract of land of Ira Carlton, Mrs. Gray and others, containing 200 acres, more or less. "This is sufficiently certain and the precise location of the land may be shown by extrinsic proof. It is not necessary that the return should have affirmed that the defendant in judgment was the proprietor of the land; this will be intended even where the regularity of the levy is drawn in question by a direct proceeding."

In *Laughlin* v. *Hawley,* 9 Colo., 170, the court said (p. 174):

> "The objection that the return of levy, certifi-

cate of sale and the sheriff's deed were void for uncertainty in the description of the property was not well taken. Where the description of the property is in such general terms as to call for evidence *de hors* the writing, parol evidence is admissible to apply it to the subject-matter and thereby render certain what would otherwise be doubtful and indefinite. 'If from such evidence it appears that the terms used as commonly understood in the neighborhood clearly designate the property levied upon or sold, the description must be regarded as sufficient.' Freem. Ex's., Section 281; *Pipe* v. *Smith*, 4 Colo., 466."

In *Buckner* v. *Vancleave*, 78 S. W. (Tex.), 541, in which there was an objection to the sufficiency of a description on a sheriff's return of sale, part of the description being as follows:

"I seized and levied on about one-third of a league of land, lying in Gonzales County on the Los Olmos, a prong of the Sandies, the same being a part of the league and labor granted as the headright of Thomas P. Crosby, bearing date September 5, 1848, about twenty-five miles from the town of Gonzales, etc."

The court said (p. 542):

"It is essential that the sheriff's return upon an execution under which land is levied upon and sold, as well as his deed, made by virtue thereof, should identify the land with reasonable certainty; but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain. The return will not be declared void, nor the deed for uncertainty, if it is possible by any reasonable rules of construction to ascertain from the description by extrinsic evidence what property is intended to be conveyed. (Citing cases.) * * * It is not a matter of conjecture what property the sheriff's return shows was levied upon, when we look to the

extrinsic evidence. From the return, aided by such evidence, it is apparent that the very land in controversy was levied upon and sold by virtue of the execution. Therefore, the court did not weigh, in admitting the return any evidence over plaintiff's objection."

In *Jackson* v. *Walker*, 4 Wend. (New York, 463), it was held that:

> "Even should the sheriff not comply with the directions of the statute in respect to the description in his return of the lands sold on execution, his neglect would not affect the title of the purchaser at the sale under the execution."

In *White et al.* v. *Luning*, 93 U. S., 514, in denying an objection that no title passed at a judicial sale because of a misdescription in the deed of the sheriff, the court said (pp. 523, 524):

> "The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish. Is this deed void for uncertainty of description or can the property intended to be conveyed be reasonably located by means of that description? * * * We do not think there is any difficulty in reaching the conclusion that the description is sufficiently certain to pass the title to the land."

This case was cited with approval in *Cox* v. *Hart*, 145 U. S., 376, 387.

In *Cox* v. *Hart*, 145 U. S., 376, the court held that every reasonable inducement would be made in favor of a judicial sale and that extrinsic evidence may be admitted to explain an ambiguous description in a

marshal's deed, where it is doubtful which of two tracts in the same neighborhood is meant.

In *Woods* v. *Hayes,* 107 S. W. (Ark.), 387, in which it was objected that the description of property in a notice of sale under an execution was insufficient because it described it as being in range "14 West" instead of "15 West" testimony was introduced to show that the property in question was commonly known by the name given to it in another part of the description and the court held that the description was sufficient to identify the property and that was the object sought to be accomplished.

In *Swiggett* v. *Kollock,* 3 Houst. (Delaware), 326, 333, it was held that the statute does not require a special or particular description in the return of a sheriff's sale; that the general description is sufficient, if such description identifies the land and its locality.

In *Guelot* v. *Pearce,* 38 S. W. Rep. (Ky.), 892, it was held that the failure of the sheriff to properly describe the land in his levy could not affect the purchaser.

Parol Evidence Generally is Admissible.

In *Duke* v. *Clark,* 58 Miss., 465, the court said (p. 473):

> "It was admissible for the plaintiffs to show that the three executions in the hands of the sheriff were levied on the land, and that it was sold under the third, although there was no indorsement of a levy on any of them except one. The failure of the sheriff to make the proper return on the executions did not affect the right of the

purchaser, and the fact that the purchaser owned the judgment executed made no difference in this respect. His right depends on what was done and not on an omission of the officer to return a correct statement of it."

In *Harvie* v. *Bostic*, 1 How. (2 Miss.), 106, in which the question involved was the sufficiency of the return of service, which was substantially as follows:

"I acknowledge service of the within writ the 21st day of September, 1831, Daniel Harvie."

The court held the service on its face to be insufficient, but said (p. 107):

"If, for instance, the court had received evidence of the handwriting of Harvie, or if the service had been proved by a witness present, it would have been sufficient."

In *Evans* v. *Davis*, 42 Ken. (3 B. Monroe), 344, in considering the question as to whether parol evidence is admissible to explain a sheriff's return, the court said (p. 346):

"Although he would not be permitted to controvert his official return, may he not be permitted to prove facts dehors the return in relation to his action under the execution, and which do not conflict but are consistent with it? If he has not returned everything he has done under an execution, may he not by parol supply the omission? * * * The rule would be rigorous and oppressive to confine them exclusively in all cases to the facts set forth in their return. * * * Courts have long since recognized the policy and the justice of indulging in presumptions in favor of sheriffs and other public officers having done their duty. Authority in support of the doctrine is abundant. Property is sold under execution and in the absence of any return that it was levied upon, the law presumes a levy."

In *Kuhn* v. *Kilmer,* 16 Neb., 699, in which it was objected that the sale under an execution was invalidated because of the misnomer in the sheriff's return and also because the return showed the notice of sale to have been made in "The Democrat" a newspaper the correct name of which was "The Columbus Democrat" the court decided against both objections and in regard to the latter said (p. 703):

> "Upon the third point there is in the Bill of Exceptions an affidavit of John G. Higgins, one of the publishers of the newspaper in question showing conclusively that "The Democrat" and "The Columbus Democrat" are one and the same identical paper. So there is no conflict or inconsistency between the return of the sheriff and affidavit of publication."

So it may be shown in the present case in support of the allegation of the Amended Bill that the sale was made at the front door of the court house in Jackson, although the return says simply that the sale was made in Jackson.

In *Wade* v. *United States,* 158 U. S., 232, it was held that on proof of the loss of the written authority appointing a deputy marshal, parol evidence was admissible to show his appointment; and, further that a *de facto* deputy is entitled to be considered as a deputy. The court said (p. 238 and 239):

> "Without expressing an opinion as to the necessity of issuing a regular commission to a deputy marshal, or as to the authority of the clerk of the District Court to administer the oath to such officer, it is clear that on proof of the loss of the written authority issued by the marshal to a deputy whom he had appointed, it may be permissible to offer oral evidence of the fact of appointment and of the service of the deputy. His

appointment and service made may be a *de facto* officer, even if the clerk who administered the oath was not empowered to do so. Acting as a *de facto* deputy by the authority of the marshal he came clearly within the provision of the statute of 1888, and is entitled to be construed as such deputy for the purpose of that statute."

Signature to the Return.

It is well established that parol proof is admissible to explain the signature on the sheriff's return and to show the official position of the person signing, and also in whose handwriting the return is made.

In *Humphrey's Ex's.* v. *Wade,* 84 Ken., 391, 396, in which the return on a levy under an execution was signed "W. F. Gillespie, D. S." It was objected that the levy was ineffectual because it was not signed, either in the name of the sheriff, by his deputy, or by the deputy for the sheriff, the court said (p. 396, 397, 398, 399):

"Both the Revised and General Statutes, (the 10th Section of Chapter 100, General Statutes) provide in reference to returns by a sheriff of his official action that '*he shall subscribe his own name to the return and if he be deputy, the name also of his principal.*' This provision of the statute while defining the duties of the sheriff and prescribing the mode of affixing the signatures of the principal or his deputy, does not render either in express terms or by inference, the act of the deputy void in the event that he fails to discharge this duty in the manner pointed out. * * * On the validity of the action of a deputy sheriff, the citizen must often depend for the security of both his person and property and, therefore, no technical construction of a statute as to the mere manner of exercising his duties should be adhered

to or established. If he does act in his official capacity, no harm can result from such a ruling and, if not, he is responsible for the wrong. It is insisted, however, that there is no evidence before us that Gillespie was the deputy of Macklin. The execution issued in the usual form from the clerk's office of Konton County, was signed by the clerk and the time of its reaching the hands of the sheriff was indorsed on the execution by that official in person. The levy was then made in proper manner and the execution returned *no sale* for want of bidders, signed 'W. F. Gillespie, D. S.'; and then a *venditioni* issued that came to the hands of the sheriff, Macklin, and by him the property levied on by W. F. Gillespie, D. S., was sold. It is true if the levy was void the *venditioni* gave no new authority to the sheriff, but in the absence of proof to the contrary, the execution, the indorsement by the sheriff, the return for want of bidders and the *venditioni* and sale under it must be held as evidence satisfactory in its character that Gillespie at the time he made the levy and return was a deputy sheriff of Macklin, the sheriff of Konton County. The court will not presume upon such a state of facts that some one had usurped the powers of the sheriff and was levying on the estate of the defendant without any authority; but on the contrary must assume that the act of Gillespie was that of a regularly constituted deputy in the discharge of duties vested in him by law. In the absence of any statute forbidding such a rule, it must be held that a mere failure of the deputy to sign the name of his principal does not render the act of the deputy void and that proof may be introduced or the return amended to conform to the facts where the validity of his official action in this regard is brought in question."

In *Martin* v. *Aultman,* 80 Wis., 150, in which the return of the service of a summons was signed "Matt.

Birchard, by J. L. Rewey, deputy sheriff," it was objected that there was no proof that Matt. Birchard was sheriff of the county, and that the deputy sheriff should have made an affidavit showing the place, time and manner of service, in order to make the service good, the court said (p. 152):

> "We deem this objection untenable. The statute makes it the duty of a sheriff to appoint one deputy in every city and village in his county, containing over 1,000 inhabitants and one in each assembly district other than the one in which the under sheriff resides. (Secs. 722, 723, R. S.) This appointment is in writing and is to be filed and recorded in the office of the clerk of the court. (Secs. 724, 725, R. S.) In this case the return was made in the name of Matt. Birchard and if the word "sheriff" has been added, we presume plaintiff's counsel would have taken no objection to it. But we consider the return to be in due form and its presumptive evidence that it is correct. The court will take judicial notice of the location of a sheriff of the County and the genuineness of his signature, and his official character need not be proven. 1 Greenl. Ev., Sec. 6."

In *Hand & Huddleston* v. *Grant,* 5 S. M., (13 Miss.), 508, 511, 512, the court said (p. 513):

> "The defendants also objected to the return, because it was not in the handwriting of Grant, and thereupon evidence was introduced that the return was made by a deputy sheriff. As the sheriff is bound by the acts of his deputy, so he must be entitled to the benefit resulting from them. A return by deputy is equivalent to a return by the sheriff."

In *Emley* v. *Drum,* 36 Penn. St., 123, 125, the sheriff's return was signed "A. Drum, sheriff, by H. Stark, deputy," and it was proved that Stark was the

sheriff's general deputy and held that this was a sufficient signature of the sheriff.

The rule is the same in respect to deputy officers generally.

In *Delaney* v. *Schuette,* 49 Wis., 366, where the certificate of the clerk of the court was made in the name of the clerk signed by the deputy clerk, the court said, (pp. 367, 368):

> "The presumption of law certainly is that the clerk was absent and that the circumstances were such as to give the deputy the right to act for the clerk. That rule of law was expressly affirmed in *Sexton* v. *Rhomes,* 13 Wis., 99, and *Huey* v. *VanWie,* 23 Wis., 613; and the decisions rest upon sound principle. In the absence of all proof upon the point, the court will not presume that officers have violated the law in the performance of their official duties. The statute gives the clerk power (Sec. 98, Chapter 13, Tay. Stats.), with the approval of the circuit judge to appoint a deputy who may perform all his duties in his absence and it must be presumed that the facts existed which gave the deputy the right to make the certificate in the present case. There is nothing in *State ex rel Hopkins* v. *Olin,* 23 Wis., 318, in conflict with these views."

In *Greasons* v. *Davis,* 9 Ia., 219, in which an attestation was as follows: "D. H. Noell, Prothonotary by P. Quigeley, deputy Prothontary" the court said, (p. 224):

> "This is taken as the act of the principal by his deputy. It is not regarded as merely the act of the deputy. * * * It is said there is no such officer as deputy Prothonotary. In such a case the existence of the office would be presumed the same as that of the principal till the contrary was shown."

A Deed is Not Necessary.

It has been held that a deed under a sheriff's sale is not necessary to pass title to the purchaser, as it is nothing more than one of the evidences of the sale; and that the title is transferred by operation of law.

In *Remington* v. *Linthicum,* 14 Peters (39 U. S.), 84, in which it was claimed that the marshal's return on a sale under execution was not admissible in evidence because it was not made before the suit was brought, the court said (p. 92):

> "This objection rests upon the hypothesis that a deed from the marshal or a special return from the execution was necessary to perfect title of the vendee, but the court of appeals of Maryland in the two cases above referred to have decided that neither the return nor the deed passed the title; that they are nothing more than the evidence of the sale; and that it is the sale which transfers the title, by operation of law. It would seem to follow from these decisions, that it cannot be material at what time this evidence is obtained. He cannot recover without it because the sale being within the statute of frauds, it must have been proved by written evidence. But whenever this evidence is obtained it proves the previous sale by the officer; and as it is the sale that passes the title, the vendee must take it from the day of the sale. The evidence may be procured, therefore before or after suit brought; or before or after the jury are sworn in the trial of the ejectment. And the special return of the marshal, in the case before us, made at the time of the trial, was admissible in evidence; for when thus made it related back to the sale and proved the title to be good from that day. The return is

also sufficiently special and complies with the statute of frauds."

To the same effect are:

Borings, Lessee, v. *Lemmon,* 5 Har. & Johns. (Md.), 225.

Barney v. *Patterson's Lessee,* 6 Har. & Johns. (Md.), 204.

Knowles v. *Sullivan,* 182 Mass., 318, in which the question as to what interest a purchaser acquired at a mechanic's lien sale, where the property was sold under foreclosure and the deed to the purchaser at the lien sale was not made until thereafter, the court said (p. 319):

"The plaintiff, by virtue of the sale acquired at least the sole equitable interest in the lien title, and the subsequent execution of the deed may, perhaps, have been unnecessary in order to entitle him to sue alone. *Hart* v. *Wingart,* 83 Ill., 282; *Remington* v. *Linthicum,* 14 Peters, 84, 92."

In *Davis* v. *Wilcoxen,* 5 La. Ann., 583, the court said (p. 584):

"We are of opinion, that the judgment, execution and sheriff's rturn, showing the adjudication and receipt of the money from the purchaser, are sufficient to prove the sale without the deed. The adjudication by the sheriff and payment of the price by the purchaser are now, by the express provisions of the Code of Practice, sufficient to transfer the property and we think was sufficient under the statutes in force in 1811. The sheriff's deed was an additional recognizement of title to the purchaser, but the defendant's rights were entirely divested by the judgment, execution, adjudication and payment of the price by the buyer."

In *Jouet* v. *Mortimer,* 29 La. Ann., 206, 213, it was

held that the judgment, execution and sheriff's return was sufficient to prove the sale without the deed and the deed is merely an additional muniment of title to the purchaser.

In *Pennsylvania, etc., Co.* v. *Cleary,* 125 Penn. State, 442, the court said (p. 451):

> "It is well settled, however, that a purchaser at sheriff's sale acquires an inchoate title in the land purchased by virtue of his bid and its acceptance bind the sheriff. The subsequent acknowledgment and delivery of the deed provides the purchaser with the evidence of his title which relates to, and takes effect as of the date of, the sale recited in it. The title of M. J. Cleary to this land vested at the time of his purchase from the sheriff on the 11th of July, 1885, notwithstanding the fact that he was not provided with the legal evidence of his title until 1888."

In *Reeder* v. *Eidson,* 102 S. W. (Tex.), 750, the court said (p. 751):

> "A sheriff's deed is a ministerial act not in all cases essential to the validity of the sale made by the sheriff, and title may be shown by proof of a valid judgment, issuance of execution thereon and a sale made thereunder and payment of the purchase money."

Leland v. *Wilson,* 34 Tex., 79, the court said (p. 91):

> "The making of a deed by a sheriff is but a ministerial act; and if the judgment and execution be valid and regular, the deed itself may be omitted in the evidence, if it be shown that the party claiming under the deed purchased under the execution. (See *Fleming* v. *Powell,* 2 Tex., 231.)"

In *Miller* v. *Alexander,* 8 Tex., 36, 44, it was held that the bid and payment of the purchase money constituted the purchaser's right at a sale under an exe-

cution and that the sheriff's deed was only evidence of the right.

In *Willis* v. *Smith,* 66 Tex., 31, 43, it was held that an interest in land acquired by purchase at an execution sale "was not destroyed by the failure of the sheriff to return the execution or to execute a deed."

In *Dickinson* v. *Kinney,* 5 Minn., 332, the court said (p. 337):

> "There was no title in the sheriff as an individual and his deed is merely the crowning act of the judicial sale and one of its forms and solemnities."

In *Lash* v. *Perry,* 19 Ind., 322, in which a complaint was filed, averring that the complainant was the owner of the described parcel of land and that an execution had been levied upon the land and a sale had thereunder and a deed issued, the relief sought was that the sheriff's sale and deed should be set aside and the title of the plaintiff quieted, the court said (p. 323):

> "It is insisted that the complaint was defective, because it did not set out a copy of the deed or other evidence of title upon which the plaintiff rests his ownership of the land. A deed is mere evidence of title. The foundation of the plaintiff's suit is his right to the land, his title; not the evidence of that right or title. Therefore, as the evidence was not the foundation of the suit, the statute does not require that it should be made a part of the complaint."

Elliott v. *Dycke,* 78 Ala., 150, in which title to land was claimed under a purchase at an execution sale and in which there was a question as to whether the sheriff's deed was lost, the court said (p. 155):

> "The judgments and executions or levies, and

the sheriff's returns were also put in evidence. This made a *prima facie* case of title in Cathran and Elliott and devolved on defendants the necessity of showing a better title, either by documentary evidence or by independent adverse holding for a sufficient length of time to bar a recovery."

In *Hamblen* v. *Hamblen*, 33 Miss., 455, the court said (pp. 461, 462):

"The title of the purchaser depends upon the judgment, the levy and the sale."

In *Stribling* v. *Prettyman*, 57 Ill., 371, the court said (p. 377):

"Defendant in error claimed title under a sheriff's sale. He need only produce the judgment and execution, to entitle the deed to be admitted."

Long continued possession by a purchaser at a sheriff's sale will create the presumption that a deed was executed by the sheriff.

In *Normant* v. *Eureka Company*, 98 Ala., 181, it was held that where a purchaser of lands at execution sale enters upon the lands purchased and holds them continuously in his own right for thirty-five years, the law will presume that a deed was executed by the sheriff. The court said (p. 187):

"From the date of the sheriff's sale to the beginning of the action in ejectment the length of time was about thirty-five years. If the purchasers took possession of the land under their purchase and held it continuously during that time in their own right under the purchase, the law would presume that a deed was executed by the sheriff. * * * Under the averments of the bill, the purchasers had a perfect equity to the land and had the right to compel a conveyance to them of the legal title. The statute of frauds expressly excepts from its operation contracts

> for the sale of the land where the purchaser pays in part or in whole the purchase money and is let into possession under his purchase. * * * We are clearly of the opinion that the purchaser, who pays the purchase money for land and takes possession of it under a legal contract of sale, whether verbal or written, has possession coextensive with the lands included in his contract of purchase, and he may show the extent of his possession by proof of the contract of sale and purchase, that in such a case the contract will fix the boundary of his possession. * * * A person in possession of land, having perfect equity, without having acquired the legal title, may come into a court of equity and enforce a specific performance, and have his title perfected, whether or not there be a pending suit involving his right and title."

It has been held that the length of time necessary to create the presumption of a deed may be within a period short of the statute of limitations.

In *Fletcher* v. *Fuller,* 120 U. S., 534, in which the question arose whether a deed could be presumed to have been executed, the court said (p. 550):

> "How long a period must elapse after the date of the supposed conveyance before it may be presumed to have existed has not always been a matter of easy determination. 'In general,' this court, speaking by Mr. Justice Story 'it is the policy of courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations in cases where the statute does not apply * * * and where the other circumstances are very cogent and full, there is no absolute power against the presumption of a grant within a period short of the statute of limitations.' "

The court also said on the question of the presumption of the execution of a deed (pp. 545, 546, 547):

Many circumstances may prevent the execution of a deed of conveyance, to which the occupant of land is entitled or may lead to its loss after being executed. It is a matter of almost daily experience that reconveyances of property transferred by the owners upon conditions or trusts which have been delayed, after the conditions are performed, or the trust discharged, simply because of the pressure of other engagements and a conviction that they can be readily obtained at any time. The death of parties may leave into hands of executors or heirs papers constituting muniments of title of the value of which the latter may have no knowledge, and, therefore, for the preservation and record of which may take no action; thus the documents may be deposited in places exposed to decay and destruction. Should they be lost witnesses of their execution or contracts for their execution may not be readily found, or if found, time may have so impaired their recollection of the transactions that they can only be imperfectly recalled and of course imperfectly stated. The law in tenderness to the infirmities of human nature steps in and by reasonable presumptions, that acts to protect one's rights which might have been done and in the ordinary course of things generally would have been done in the particular case under consideration, affords the necessary protection against possible failure to obtain or to preserve the proper muniments of title and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions; and thus gives peace and quiet to long and uninterrupted possessions. * * * It is not necessary therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution."

And the rule, generally stated, is, that long possession will raise the presumption of almost every variety of written evidence of title.

In *Grand Gulf Railroad, etc.*, v. *Ryan*, 8 S. & M. (16 Miss.), 234, the court said (p. 279):

> "The authorities abundantly prove that in favor of long possession almost every variety of written evidence of title will be presumed. The defective links in the chain of title will be supplied by presumption and the title declared perfect, where the possession has been continued for a great length of time without interruption."

In *Stevenson's Heirs* v. *McReary*, 12 S. & M., (20 Miss.), page 9, in which it was contended that an administrator's sale was invalid, because he failed to observe the proper preliminary steps, the court said (pp. 45, 46, 47):

> "The doctrine of presumption arising from lapse of time has been pressed as sufficient to overcome whatever may seem to have been omitted by the administrator in the discharge of his duty and it is entitled to great force; sufficient indeed as it seems to us to obviate most of the objections raised and we shall first consider of this doctrine, before we proceed to notice the several objections raised, as their force will be best understood. * * * There seems to be then a fair field for the application of the doctrine of presumption to the present case. What is the effect of its application? It seems to be this: When the plaintiffs prove title in the ancestor and heirship, their case is *prima facie* made out. To rebut this the defendant introduces a deed from the administrator of the ancestor and proves that some of the requisite steps are taken to enable the administrator to sell. But in ordinary cases this would not do; the defendant must prove affirmatively,

> by the records of the Probate Court, that all preliminary steps were regularly taken. As a substitute for the broken links in the chain of title, the defendant relies on his own uninterrupted adverse possession as sufficient to justify the presumption in connection with his deed and the other evidences that this title in its inception was perfect; that the power of the administrator was duly exercised and that the plaintiffs had virtually acknowledged the goodness of title by their long acquiescence. We have then the legal presumption in favor of the defendant to rebut the *prima facie* case of the plaintiffs."

In the present case, it is immaterial whether the title acquired by plaintiffs in error through the purchase at the Marshal's sale, was a perfect legal title or only an equitable one, as either would be sufficient to support the suit.

In *Gentry* v. *Gamblin*, 79 Miss., 437, under Sec. 500 of the code, providing for suits to remove clouds upon title to real estate the court said:

> "A bill in equity, therefore, will lie if the complainant have either a perfect legal or perfect equitable title to the lands involved."

And it was similarly held in the present case of *Jones* v. *Rogers*, 85 Miss., 802.

Statute of Frauds.

It is well settled in Mississippi, that the sheriff's return on an execution under which there was a sale of real estate must be regarded as a sufficient memorandum to take the case out of the statute of frauds.

Hand & Huddleston v. *Grant*, 5 S. & M. (13 Miss.), 508, 511, 512.

And it has been similarly held in Maryland:

Remington v. *Linthicum*, 14 Peters (39 U. S.), 84, 92.

Barney v. *Patterson's Lessee*, 6 Har. & Jones (Md.), 204.

On the above authorities, we submit that it unquestionably appears that the return, even if standing alone and unsupported by the supplementary allegations of the Amended Bill, cannot be held in this collateral proceeding to be so defective or irregular as to invalidate the Marshal's sale. And when considered in connection with the allegations of the Amended Bill, which cure all the defects, no possible objection whatever can be urged against the regularity or validity of the sale.

Decision of the State Court on the Federal Question on the First Appeal.

In deciding the Federal question on the first appeal (Trans., pp. 21-34, *Rogers* v. *Jones*, 85 Miss., 802), the State Court said they would waive a discussion of the first and second assignments of demurrer, which were respectively that the allegations of the Bill did not warrant the conclusion that the plaintiffs in error were heirs at law of John Martin, and that proper parties were omitted, and stated that "the case can and should be decided upon *broader* lines." The "*broader lines*" disclosed by the opinion consist of hypercritical objections to the return, and a strict, harsh construction of the allegations of the Bill which seem to imply a purpose on the part of the court to defeat the intent of the Bill, rather than to

interpret its reasonable meaning. All intendments and presumptions were indulged against the Bill and the return. Instead of endeavoring to uphold the Marshal's sale, as the universal rule requires, the court apparently reversed the rule and sought to defeat it on the most technical grounds. It is true that ordinarily the allegations of the bill will be construed most strongly against the pleader, but the rule is equally true that judicial sales are favored in law and that the object of the courts should be to sustain rather than to defeat such sales. The court should have borne both rules in mind, instead of being governed by the former alone. But in applying the rule that the allegations will be construed most strictly against the pleader to the interpretation of the Bill and the return, the court apparently were of the opinion that the rule intended that where the Bill or the return was susceptible of two constructions that one should be adopted which would defeat rather than sustain the sale.

It is difficult to ascertain from the opinion of the court which of those parts of the return that they passed upon, were held to be contradictory to the allegations of the Bill and which were not. In referring to the fact that the return was signed by "Wm. M. Gwyn, Marshal, Per F. S. Hunt," they said that it is well settled that "when an exhibit is made part of the bill by Section 528, Code 1892, and is contradictory to some averment in the bill, the fact will be taken in conformity with the exhibit." This is the only contradiction which they specifically say exists, but whether in their opinion contradictions also exist in the other objec-

tions to the return which they consider, does not clearly appear. According to the rule stated, however, unless the contradictions are positive and plain, the recitals in the return would not prevail over the allegations in the Bill, and the return should not be considered alone but should be interpreted in connection with the allegations. The court stated that they would "refrain from deciding the question" as to the sufficiency of the signature to the return. On the authorities, however, there can be no doubt whatever that the signature is good, especially when it is considered with the positive allegations of the Bill that the sale was made by the Marshal. If there were any doubt as to who actually made the sale, parol proof would unquestionably be admissible to support the return. The court said they preferred to "predicate" their "conclusions upon other and more important grounds, for," in their "opinion, this sale to John Martin is absolutely void under well recognized principles, for many reasons, *inter alia.*" Then follow the actual grounds of the decision which concisely stated, are: First. That the return not only fails to show the County or State in which the lands are situated, but in describing them as "lying on or near the sea shore in the '*vicinity*' of Mississippi," it shows that "none of this land was *in* this State at all, but was 'in the *vicinity* of Mississippi.'" We submit, however, that the return does recite the fractional sections of the lands and the Township and Range in which they are located. Second. That although the return recites that the sale was made "in Jackson" which was not in the County where the land was situated, it fails to state that it was made at

that place on the *written request* of the defendant; and further that it does not state that the sale was made at the front door of the State House in Jackson, the same being the place where the United States Court was held.

In answer to the first objection, it may be said that both the Original and the Amended Bill describe the land with particularity and expressly allege that it is situated in the County of Harrison and the State of Mississippi. Over these allegations we presume the court held that the phrase "lying on or near the seashore in the *'vicinity'* of Mississippi" prevailed because of a contradiction, although the contradiction is not definitely indicated by the court, and that the recital in the return established conclusively, beyond the aid of extrinsic evidence, that the land levied on was not situated in Mississippi. Yet the Supreme Court of Mississippi in *Duke* v. *Clark,* 58 Miss., 465, 473, emphatically declared that a purchaser's right at a sheriff's sale "depends on what was done and not on an omission of the officer to return a correct statement of it." The court did not seem to consider at all the fact that the execution under which the Marshal levied, and which constitutes part of the same exhibit "A" as does the Marshal's return [Trans., p. 11, exhibit to the original bill; Trans., p. 48, exhibit to the Amended Bill] was directed to "the Marshal of the Southern District of Mississippi"; and, further, that the judgment under which the execution issued, which is also part of the same exhibit "A," shows that it was obtained in the Circuit Court of the United States for the Southern District of Mississippi. Notwithstanding, however, the court presumed that the

Marshal committed an illegal act and levied on land beyond his jurisdiction; and in so holding the court reversed the established rule, which the authorities previously cited announce, that in respect to sales on execution the presumption will always be indulged in favor of a legal rather than illegal, act, on the part of the officer conducting the sale. In other words, *in order to defeat the sale,* the Court have been forced to *presume* that the Marshal *committed an illegal act.* Furthermore, the Court seem to ignore the rule allowing parol testimony to aid the description in a return. We do not think it necessary to cite again the authorities on this point from which we have previously quoted voluminously, holding that the rule is just exactly the opposite to what the court conceived it to be. We shall, however, briefly refer to several cases which are directly in point.

In *Bacon* v. *Bevan,* 44 Miss., 293, 295, it was said, "Nice criticisms of the words used by the sheriff" in his return on a summons will not be indulged. It will be sufficient if it can be fairly inferred from his return that he met the requirements of the law.

In *Humphrey's Executors* v. *Wade,* 84 Ky., 391, 398, 399, the court said that it will not be presumed that some one usurped the powers of the sheriff and levied on an estate without authority.

In *Camp* v. *Smith,* 98 Ind., 409, it was held that when an execution is directed to a sheriff of a *certain County,* it must be *presumed* that the *land levied upon* was in *that County,* because the sheriff could not levy on land outside of his County.

In *Randolph* v. *Carlton,* 8 Ala., 606, 614, it was held

that when a sheriff was commanded to attach the *defendant's estate,* it will *not* be *presumed* that he *levied* on the property of *another person.*

In *White* v. *Luning,* 93 U. S., 514, the court said (pp. 523, 524):

> "The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish."

On a reasonable construction of the return we think it is clear that the word "vicinity" was used either through a clerical error or through ignorance of its meaning. And in construing any instrument the general familiar rule is that the principal object sought to be attained is simply to ascertain the intention. Even in the construction of statutes words may be modified, altered or supplied, so as to obviate any repugnancy or inconsistency with the intention.

Loverin v. *McLaughlin,* 161 Ill., 417, 430.

We are confident that this sale will not be defeated simply because of the incorrect use by the sheriff of the word "vicinity."

In concluding the discussion of this objection we maintain that it is the only possible ground on which the opinion of the state court could be sustained if applied to the Amended Bill, as by the amendments the bill has obviated all other objections stated in the opinion.

In the last analysis, therefore, of the opinion of the state court, if applied to the Amended Bill, the opin-

ion would invalidate the marshal's sale and thereby the title of plaintiffs in error, merely because of the incorrect use by the marshal in his return of the word *"vicinity."*

The *second* objection to the return by the state court is obviated by the allegations in the Amended Bill. It is therein expressly alleged that the sale at Jackson was made "at the written request of the defendant, James McLaren." (Trans. 39; Rec., 64.) And there is a further express allegation that the sale was made "before the front door of the State House at the Capitol of Mississippi, at Jackson, Mississippi, where the United States Circuit Court was then held and said sale was conducted in all respects according to law." (Trans. 38; Rec., 63.) On the authorities however it is not necessary for the return to state that the sale was made at the written request of the defendant. If it had so stated, the recital would not have been conclusive, for the return is merely *prima facie* evidence.

> *Minor* v. *The President* and *Selectmen of Natchez*, 4 S. & M. (12 Miss.), 602, 621, 623.
> *Joyner* v. *Miller*, 55 Miss., 208, 210.

In *Minor* v. *The President and Selectmen of Natchez, supra*, the court said (p. 623):

> "The sheriff's return would not be conclusive evidence, even if he was bound to certify in his return that he had given the requisite notices, but he is not.".

And the court also held (p. 621) that where a sheriff's return did not state that the advertisement of the sale was made in a newspaper *at the request* of the

defendant, the omission did not invalidate the sale as the fact could be shown by proper evidence.

In *Preston* v. *Wright,* 60 Ia., 351, it was held that where a statute provides that the execution debtor and the plaintiff may choose an appraiser at an execution sale and that in the absence of either party, the officer making the sale shall choose one or both, the failure of the return to show that the *defendant was absent* did not invalidate the sale.

Certainly it will not be contended that the return states a different place of sale from that of the amended bill, for, as we have previously indicated, the return recites that the sale was "in Jackson" without specifying the place in that town, while the Amended Bill also states that the sale was in Jackson, but further alleges that it was before the front door of the State House at the Capitol of Jackson, where the United States Circuit Court was held. It is perfectly apparent that there is no contradiction in these two statements.

In respect to the question whether a deed would be presumed to have been executed by the marshal where the bill did not expressly allege that a deed was executed, the state court held that "it would seem that if any presumption should be indulged in, it should be *against* the complainants and against the existence of the deed." The reasons stated by the court for this conclusion are as follows: that "60 years have elapsed since this sale;" that "the complainants failed to aver that there was any deed duly executed or that their ancestor ever took possession, or that he or they remained in possession (especially when they allege that

defendants are now in possession);" and that "they rely *solely* and *merely* on the *return* of an answer under an execution." In support of this latter statement they cite the case of *Cooper* v. *Granberry*, 33 Miss., 117, to show that a return does not transfer title, but only gives a right to demand a deed, apparently under the impression that plaintiffs in error were basing their claim of title on the return alone.

We fail to perceive how the length of time since the sale, raises the presumption that no deed was executed. The court certainly did not intend to imply that the length of time of the concealed fraud created a doubt as to the truth thereof; for in *Prevost* v. *Gratz*, 6 Wheat. (19 U. S.), 481, the court said by Justice Story (pp. 497, 498):

> "In a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense and calls more loudly upon a court of equity to grant ample and decisive relief."

The objections that the bill does not aver the execution of a deed and that the purchaser took possession are obviated by the allegations in the Amended Bill. It alleges on belief that a deed was executed, but that it was destroyed when the court house was burned. (Trans., 41; Rec., 67.) We submit, however, that a deed is not a p[illegible]equisite to the maintenance of this suit, as plaintiffs [illegible] error unquestionably, in any event, possess an equitable title.

The Amended Bill also alleges that John Martin, the ancestor of the plaintiffs in error and purchaser at the

sale "then and there was put into possession of the aforesaid land by Wm. M. Gwyn by and with the consent of the aforesaid McLaren, and the said John Martin remained in the continuous, uninterrupted and undisputed possession of the said land, claiming the same as his property by the title acquired by him at this sale, until his death in the year 1848." (Trans., 39; Rec., 63.)

In answer to the courts' statement that plaintiffs in error "rely solely and merely on the return of an officer under execution," we desire again to reiterate emphatically and positively that plaintiffs in error do not rely "solely" and "merely" on the return, but that they are fully aware of the undisputed rule of law that the return of a sale on an execution does not transfer the title. Plaintiffs in error rely on the judgment, levy and sale, which are sufficient on the numerous authorities which we have cited above, to make a *prima facie* case. Among the cases which we have cited are the following:

Hamblen v. *Hamblen*, 33 Miss., 455, 461, 462.
Cooper v. *Granberry*, 33 Miss., 117.
Elliott v. *Dycke*, 78 Ala., 150, 155.
Davidson v. *Chandler*, 65 S. W., 1080.
Johnson v. *Carson*, 3 G. Gr. (Ia.), 499, 500.
Stribling v. *Prettyman*, 57 Ill., 371.

It would appear from the language of the state court quoted above that in considering this case the court were of the impression that the title of the plaintiffs in error depended entirely upon the return, or else that the plaintiffs in error were so contending, and that since the return was the foundation of the title, it was

necessary that it should be precise and formal in all of its recitals. This probably explains the reason why the court considered the return with such minute particularity and indulged all intendments against, rather than in favor of, its validity.

On the allegations in the amended bill plaintiffs in error undoubtedly acquired an equitable title, whether a deed was actually made or not. The authorities are unanimous on this point, although they may not agree as to the necessity of a deed to pass the full and complete title. There is excellent authority, however, which we have cited, holding that the execution of the deed is a mere ministerial act and wholly unnecessary to convey title which, it is said, passes by operation of law. Be this as it may, however, on the showing made in the Amended Bill, plaintiffs in error unquestionably possess an equitable title, and that is all that is necessary to maintain this suit, as was held in the opinion of the state court on the first appeal now under consideration, reported in *Jones* v. *Rogers,* 85 Miss., 802.

To the same effect is:

Gentry v. *Gamblin,* 79 Miss., 437.

The case of *Cooper* v. *Granberry,* 33 Miss., 117, cited in the opinion on the first appeal, in which it was held that a return did not transfer title, but only gave a right to demand a deed and that in the absence of a showing that a deed was made, it would be presumed, after fifteen years, that the purchaser did some act renouncing his bid, does not apply, in respect to the latter presumption, to the Amended Bill for the reason that it did not appear in that case, as it does in the

present, that the purchaser at the sale was put in possession and remained in continuous possession for a number of years. The allegations in the Amended Bill that the purchaser at the marshal's sale was put in possession of the lands and remainded in continuous possession until his death which was about ten years thereafter, bring this case clearly within the case of *Normant* v. *Eureka Co.*, 98 Ala., 181, 187, also considered by the state court, in which it was held that where a purchaser at a sale under an execution takes possession and holds it continuously for thirty-five years, the law will presume that a deed was executed by the sheriff. That case also held that the sheriff could be compelled to execute a deed. It was similarly held in:

People v. *Grant*, 61 N. Y. App. Div., 238.

And by statute in Mississippi the sheriff can be compelled to execute a deed.

Section 2771, Code of Mississippi, 1906.

In *Fletcher* v. *Fuller*, 120 U. S., 534, 545, 550, it was held that the length of time necessary to create the presumption of the execution of a deed may be within a period short of the Statute of Limitations.

But whether or not the continuous possession of the purchaser at the sale in the present case raises the presumption of the execution of a deed, it at least certainly invested the purchaser with an equitable title which plaintiff in error acquired by descent, and that is sufficient to maintain this proceeding.

Respectfully submitted,

FRANK JOHNSTON,
Counsel for Plaintiffs in Error.

A. Y. HARPER,
Of Counsel.

Office Supreme Court, U. S.
FILED.
APR 27 1909
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

October Term 1908

No. 196

W. O. ROGERS, ET AL., Plaintiffs in Error,

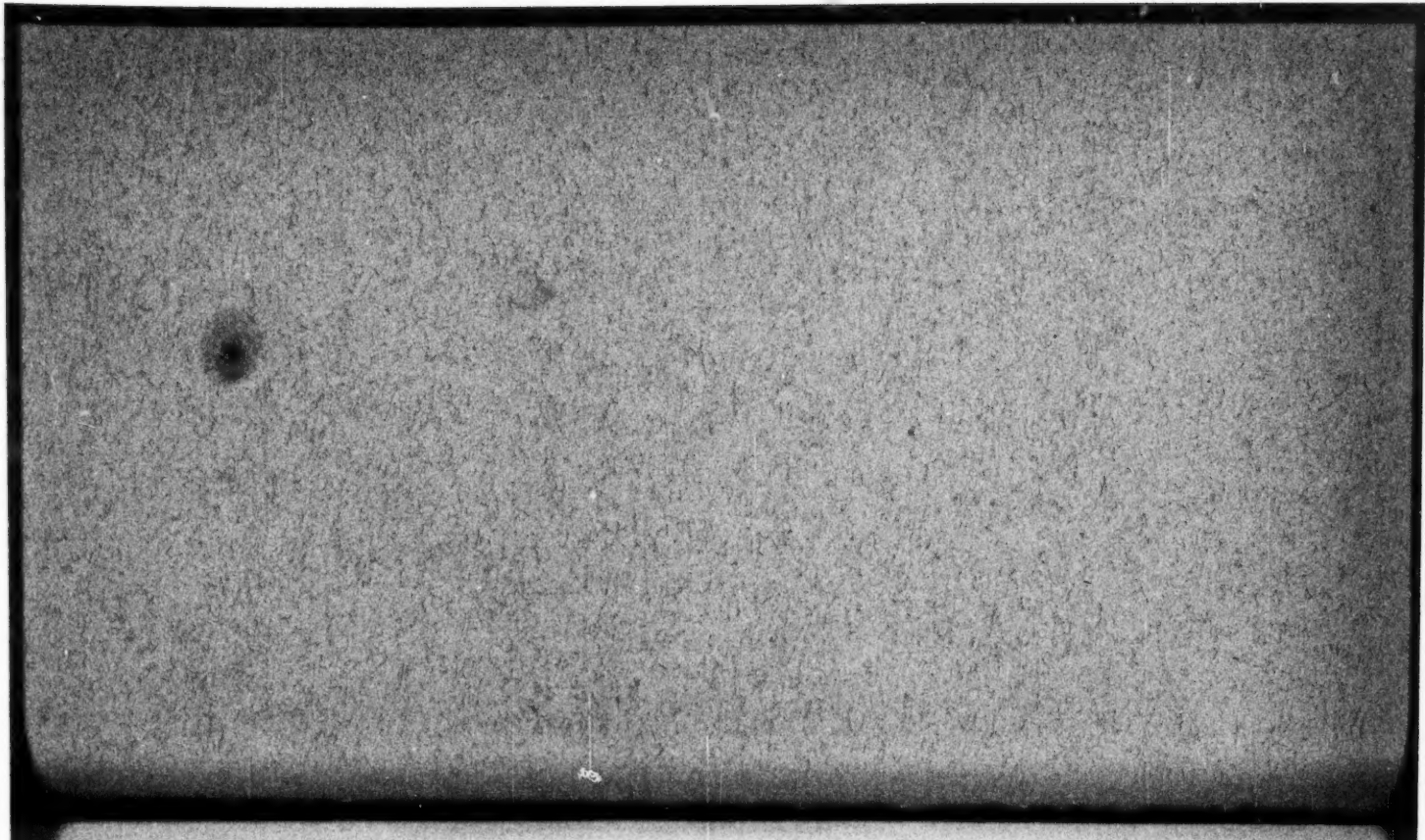
vs.

JOSEPH T. JONES, ET AL., Defendants in Error.

Brief in Reply for Plaintiffs in Error

FRANK JOHNSTON,
Counsel for Plaintiff in Error.

A. G. HARPER,
of Counsel.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D., 1908, No. 196.

W. O. ROGERS, JR., *et al.*, *Plaintiffs in Error*,

vs.

JOSEPH T. JONES, *et al.*, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF IN REPLY FOR PLAINTIFFS IN ERROR.

I.

The following questions presented in the brief for the defendants in error, are argued in the original brief for the plaintiffs in error, but will be briefly alluded to again.

1. It is, I respectfully submit, perfectly clear, on the authorities cited in my original brief, that there is a Federal question in the case.

2. It is equally clear, from the argument of the case already presented for the plaintiffs in error, that there is no non-federal question involved and there is certainly no such question in the case, that in any correct view, can be held to constitute a ground for the decision of the State court.

3. The objection that Exhibit "A," showing the marshal's return is contradictory of the averments of the bill, has been presented fully, and it is perfectly clear that the averments of the bill are only explanatory of the exhibit, and in aid of the description of the land in the marshal's return.

4. The objection, that the marshal's sale was at the wrong place has been fully answered, and I will merely add in this connection, that the bill shows that the sale was made by the written request of the defendant in the execution. That the return shows that all of the lands, including those in controversy, were levied on under seven executions, and at the same time. That the return, upon a fair construction, shows that these sales were by the written consent of the defendant in execution. The averment is made in the bill, which is admitted by the demurrer, that the sale of the land in controversy was made "at the written request of the defendant, James McLaren." (Trans., 39; Rec., 64). This is conclusive of this question.

In the absence, however, of any recitals of the consent or request of the defendant, in location, it will be presumed as matter of law that it was made and that it may be shown by proper evidence.

It is expressly held by the decisions that this class of notices constitute no part of the record, and are matters *in pais*, and to be proved by proper evidence *aliunde*. It is immaterial that they are not shown on the return.

Minor *vs.* President and Selectmen of Natchez, 5 S. & M., 602, 621, 623.

To the same line is the case of *Preston vs. Wright*, 60 Iowa, 361.

In the case at bar, the property could be sold in the county where it was situated, or at Jackson, the place of holding the Federal Court. At the latter, at the request of the defendant in execution. So a sale at Jackson by the Marshal would be presumed, *prima facie*, to have been made at the request of the defendant. This is wholly unlike the case of *Koch vs. Bridges*, 45, Miss. 257, cited by counsel for defendents in error, where the county seat was the only place for execution sales, and where the sale was made in a different town.

On the contrary, the case now before the Court comes within the doctrine of universal acceptance, that with a judgment and execution shown, every intendment is indulged to support judicial sales.

(Cases cited on original Brief of Plaintiffs in Error, pp. 23 and 24.)

The objection that it is not averred that F. S. Hunt was not a Deputy Marshal, is without any force whatever. The bill avers that the sale was made by William M. Groyn, Marshal.

The return is signed, "William M. Groyn, Marshal, Per F. S. Hunt."

The contention of counsel for defendants in error, that the presumption is, that F. S. Hunt was an interloper and without authority, cannot be taken seriously.

The judgments were rendered by the Federal Court, the executions were directed to the Marshal, and the returns were made in the Marshal's name, and his name is signed to the returns. The legal presumption must be that the return was made by proper authority. The

burden of proving the contrary, is on the party attaching the execution sale. Certainly, in any possible view, such an attack could be met by proper evidence showing the validity of the sale, and of the authenticity of the return. The averment in the bill that the sale was made by the Marshal, must, on the demurrer, be taken as true. Nor is the return signed by the Marshal by his deputy, contradictory of the bill, for it is essentially the act of the Marshal, although signed in his name by his deputy. The act of this deputy was valid although he was only a *de facto* officer. *Wade vs. United States*, 158 M. S. 232. I refer also to the cases cited in my original brief, in respect to the competency of parol evidence to prove the signature of an officer to a return. (Pages 80, 91, 92 and 93.)

A final and complete answer to this objection is, that the fact of the sale could be proved by proper evidence, no matter what defects existed in the return. It is the *judgment*, the *execution*, and the *sale*, that gives the purchaser a title.

6. The objection to the description of the property in the return is completely answered in the original brief of the Plaintiffs in error. The amended bill states clearly and explicitly that the property is in Mississippi, and in the town of Gulfport, and as it is competent to prove by proper evidence the location and identification of the property, this averment is good on demurrer. The rule is universal that the description of property in a deed, and *a fortiori* in a return an execution may be aided and shown by parol evidence. I refer upon this point,

to *Peacher vs. Strauss et al.*, 47 Miss., 353, and to the cases cited in my originial brief pp. 82 to 87 inclusive.

7. The objection that the complainant's claim is stale, and of laches, is met in my original brief, by the cases showing that this whole doctrine is rejected by the well settled adjudications of the Supreme Court of Mississippi. Nothing short of the period of limitations will ever bar plaintiff's remedy, either at law or in equity in this State.

Cox *vs.* Mortgage Co. 88 Miss., 88;
Will *vs.* Nast, 73 Miss. 862;
Houston *vs.* Building Association, 80 Miss. 31.

I will add that the land was open and non-occupied from the date of John Martins death in 1848, until June, 1902, when the defendants entered upon it without any authority. The originial bill in the case was filed November 11th, 1903

According to the law of Mississippi, no statue of limitations runs against an action for the recovery of land where there is no adverse possession. This, of course, excludes, necessarily, staleness or laches as a bar to the remedy. The latest decision of the Supreme Court of the State is in the case of *Kennedy vs. Sanders*, 90 Miss., 524.

II.

New Questions in Brief of Counsel for Defendants in Error.

1. It is objected, that the complainants in this cause can not maintain this proceeding upon the contention that they only have an equitable title.

The Mississippi decisions, without an exception, uniformly hold the doctrine that a complainant may maintain a bill of this character upon either a perfect legal, or a perfect equitable title.

Gentry *vs.* Gamblin, 79 Miss., 438.
Tonline *vs.* Heidelborg, 32 Miss., 268.
Jayne *vs.* Boisgerard, 39 Miss., 796.
Huntington *vs.* Allen, 44 Miss., 654.
Hardy *vs.* Newman, 51 Miss., 166.
Griffin *vs.* Harrison, 52 Miss., 824.

2. The objection of counsel for defendants in error, that the heirs of James McLaren are not made parties defendant, is based on the suggestion that it is not averred in the bill that he did not make a will, and that it will be presumed, says the learned counsel, that he died testate, and the legal presumption is that the dedefendants in the cause claim under his will. This ignores the explicit averment of the bill that *he left no heirs and died intestate.* But in the absence of this averment there was any such presumption that the defendants in the cause were his devisees, then the obvious answer is, that they are parties defendant and are in court.

The learned counsel have ventured upon the other assertion and contradiction, that the land has escheated to the State. The bill avers explicitly that the land never escheated to the State.

Lands do not escheat to the State *ipso facto* upon the death of an owner who dies intestate and leaving no heirs. A formal proceeding by the State is necessary in order to establish an escheat.

> Act of June 13, 1822, Howard & Hutchinson's Code, p. 360, section 75, et seq.
> Code of 1906, Section 1880.

There was never any such proceeding, and none was had for the obvious reason that McLaren's estate in his lands went to the purchasers at the execution sales.

This is a new suggestion, made for the first time in the case, and one which does not appear in the demurrer to the bill, nor in any proceedings or decision in the cause. It is entirely outside of the record in this case.

3. It is further objected that it is not shown by the bill, that the complainants are the heirs of John Martin deceased. This objection ignores entirely the specific allegation of the bill, that the complainants are the lineal decendants and the sole heirs of John Martin, who died intestate. This is correct pleading. It is sufficient without tracing in detail the pedigree of the complainants. This suggestion was not made in the State Courts, or considered either by the Chancery or the Supreme Court of the State. If it had been so considered and held insufficient, an amendment would have

allowed on this point. As it was, the cause was remanded for an amendment in respect to the Statute of Limitations.

4. The objection is made that, as the statute of the State required a forthcoming bond with sureties, the execution was irregularly issued.

This is another point that was never considered by the State court. If such an irregularity existed, which I deny is shown anywhere in this record, it would not affect the title of the purchasers at the execution sales.

But it does appear that all of the various judgments and the execution were against "*McLaren & Hammond and Sureties.*"

If, therefore, there is to be any assumptions on this point, the presumption will be that the sureties on such bonds were included in the judgments and executions.

That there was no irregularity in this respect is shown by the fact that the sales were made by the consent and request of McLaren, as is expressly stated in the bill. (Trans., p. 49.)

5. Another speculation of the learned counsel is that, as the first sales brought in the aggregate about $11,000, it will be presumed, that this sum was sufficient to pay off all the judgments, and that the marshal made the second sale under a satisfied judgment.

This is a new idea not heretofore suggested in the demurrer, on the argument, or in the decisions of the State courts.

There are several answers to it. In the *first place*, the amounts of the several judgments under which the first

sales on October 7th, 1839, were made are not shown by anything in this record. It is, therefore, impossible to assume that there was enough surplus left of the proceeds of the first sales, to pay off the judgment under which the second sale on October 28th, 1839, was made. In *second place*, McLaren knew of all the sales, and requested them to be made at Jackson, and took no steps to prevent the sale, and could not have attacked the title of the purchaser.

Attention is again called to the averment of the bill, that McLaren requested this particular sale to be made at Jackson. (Trans., p. 49.)

If any assumptions are to be made, it would be presumed, in the absence of any showing to the contrary, that the Marshal had made a proper application of all of the proceeds of the sale of October 7th, leaving a balance due on the execution under which the sale of October 28th was made. This is the only legal presumption that can possibly arise on the subject.

I respectfully submit to the Court that the recital in the Marshal's return that the executions were against "McLaren and Sureties," shows that there was necessarily a forfeited forthcoming bond, and that the proceedings were, not only against the principal debtors, but against their sureties.

6. The suggestion of counsel for the defendants in error, that the property is worth $760,000, and has been greatly enhanced by improvements placed upon it by the defendants in error, and that the plaintiffs in error per

mitted these improvements, and are estopped from claiming title to the property, is all outside of the record.

No such defence is set up in the demurrer to the bill, and no such question has been raised or decided in the cause.

The record shows that the bill in this case was promptly filed and within one year and five months after the defendants entered upon the land.

This new suggestion can be met with the statement that the improvements were not made before the commencement of this suit, if it is permitted to allude to matters outside of the record.

It is not correct as a legal proposition to say that a plaintiff out of possession is estopped from asserting his title because the adversary has entered upon the lands and made improvements which he knew were being placed on the land, standing by and doing nothing to deceive or mislead his adversary.

But it is enough to say that the defense of estoppel nowhere appears in the record in this case.

III.

As I have shown in my original brief, and to which I again call the attention of the court, the only specific objection made to the execution sale in the demurrer is to the description of the property in the marshal's return. This is in the second ground as the demurrer.

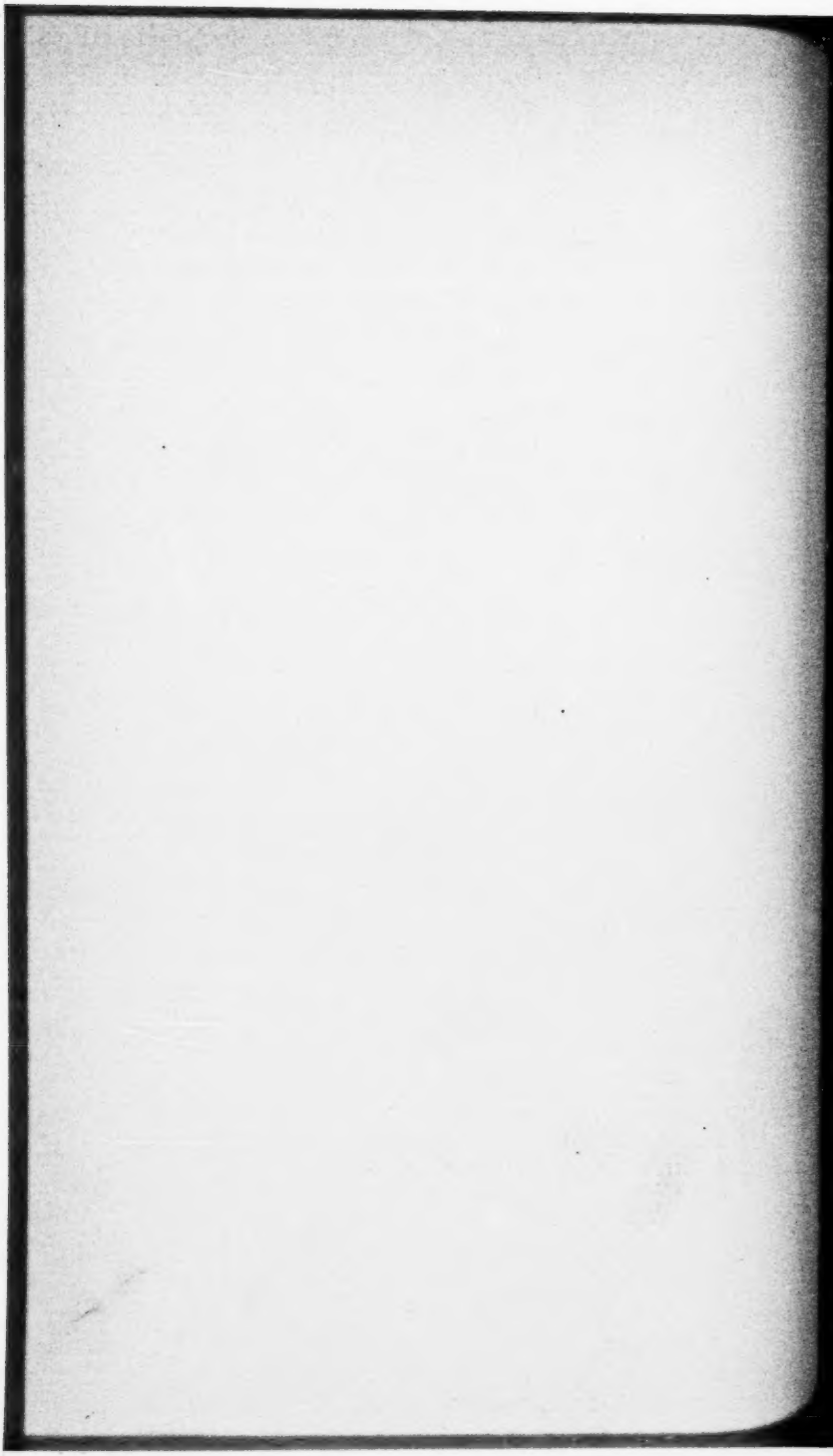
The first ground of demurrer is too vague and general to be considered as presenting any particular or

specific objection to the sale, and should not properly be considered. It was not considered by the State court, whose decision rested alone upon the ground of the insufficiency of the description in the return, and the fact that the sale was made without authority at Jackson.

The discussion of the case has taken a wide range, but judicially and correctly considered, the validity of the sale of October 28, 1839, is the only question properly arising. It is respectfully submitted to the court that the case should be reversed and remanded.

FRANK JOHNSTON,
Counsel for the Plaintiffs in Error.

A. G. HARPER,
Of Counsel.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 196.

W. O. ROGERS, JR., G. M. ROGERS, JOHN B. MARTIN, ET AL.,
Plaintiffs in Error,

vs.

JOSEPH T. JONES, THE COUNTY OF HARRISON, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OF DEFENDANTS IN ERROR

NO SUCH FEDERAL QUESTION PRESENTED BY THE RECORD IN THIS CASE AS TO WARRANT ITS REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

Plaintiffs in error seek to have a final judgment of the Supreme Court of the State of Mississippi, sustaining a demurrer to the original bill in the case and dismissing the cause, reviewed by the Court on the theory that the decision of the Supreme Court of Mississippi involved the construc-

tion of a return made by a United States Marshal on a writ of fieri facias that has been issued by a Federal Court, and also a statute of the United States, fixing the time and place for making judicial sales under processes issuing out of Federal Courts.

The only reference to any Federal question in the pleadings in this cause is the following language in the original bill.

> "Your orators further state *par parenthesis*, that they are claiming their rights and title to this property under a marshal's sale made under and by virtue of the laws and constitution of the United States of America, and they now and here desire to lay the proper predicate, so that they may have these proceedings in this case reviewed and revised by the Supreme Court of the United States, in case the decision of the Supreme Court of the State of Mississippi is adverse to their lawful, just, and *bona fide* claim—having derived the same from the patentee of these lands."

This allegation presented no question of a Federal nature to the Courts of Mississippi for decision. It did not bring forward any question calling for a construction of a United States statute, which to construe one way would confer a right upon plaintiffs in error, and the other way would operate to deny or impair that right.

The bare averment of a Federal question is not sufficient; there must at least be color or ground for such averment. Hamlin v. Western Land Co., 147 U. S., p. 531. (L. Ed. Book 37, p. 267.)

The only color, or reasons for the averment in the instant case are, first that plaintiffs claimed under a sale by a United States Marshal—a Federal officer. Secondly, that they derived their rights from the patentee of the United States.

The fact that a party to a suit is a Receiver of a United States Court does not necessarily create a Federal question authorizing a review of the case by the Supreme Court of the United States.

> Bausman *v.* Dixon, 173 U. S., 113. (L. Ed. Book 43, p. 633);
> Natl. Bank of Lincoln *v.* First Natl. Bank, 172 U. S. 425. (L. Ed. Book 43, p. 502.)

Nor does the fact that plaintiffs in error claim lands under a patentee of the United States create such Federal question. In Blackburn *v.* Portland Gold Mining Co., 175 U. S., p. 571. (L. Ed. B. 44, p. 175), this honorable Court in passing upon this identical question says:

> "This Court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an Act of Congress, for that reason alone presented a Federal question. This in Romie *v.* Cassanova, 91 U. S. 370, 23 L. Ed. 375, which was an action brought to recover possession of certain lands in the City of San Jose, the question to be determined was, which of two parties had actually obtained a grant of the particular premises in question. The title of the City had originated before the cession of California to the United States. But the Court said: 'The title of the City was not drawn in question. Even if it depended upon the treaty of Guadalaupe Hildalgo and the several acts of Congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title and their litigation extends only to the determination of the rights which they have severally acquired under it. Accordingly the writ of error to the Supreme Court of California was dismissed for want of jurisdiction.'"

To the same effect are the following cases:

McStay *v.* Friedman, 92 U. S. 723, 23 L. Ed. 767.

Little York Gold Washing and Water Co., *v.* Keys, 96 U. S. 199, 24 L. Ed. 626.

Shoshone Mining Co. *v.* Royal J. Rutler *et al.*, 177 U. S. 505, 44 L. Ed., p. 864.

There was no question before the Supreme Court of Mississippi in this case as to the validity of the patent from the United States to James McLaren, nor as to the nature or extent of the estate it conveyed. All parties to the suit concede that the patent vested a fee simple title in McLaren. The controversy is who now holds that title. We therefore respectfully submit that the pleadings in this case wholly failed to state any question of a Federal nature which the Mississippi Courts could have determined adversely to plaintiffs in error.

THE FEDERAL QUESTION MUST BE THE CONTROLLING QUESTION IN THE CASE.

The determination by a State Court of a Federal question adversely to the plaintiff in error will not sustain the jurisdiction of the Supreme Court of the United States, if another question not Federal was also raised and decided against him and the decision thereof is sufficient, notwithstanding the Federal question to sustain the judgment.

Harrison *v.* Morton, 171 U. S. 38, 18 Sup. Ct. Rep. 742. 43 L. Ed. 63.

Bacon *v.* Texas, 163 U. S. 207, 16 Sup. Ct. Rep. 1023, 41 L. Ed. 132.

Egan *v.* Hart, 165 U. S. 188, 17 Sup. Ct. Rep. 300, 41 L. Ed. 680.

Del Castillo *v.* McConnico (Castillo *v.* McCon-

nico) 168 U. S. 674, 18 Sup. Ct. Rep. 229, 42 L. Ed. 622.

Pierce v. Somerset R. Co., 171 U. S. 641, 19 Sup. Ct. Rep. 64, 43 L. Ed. 316.

Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co., 172 U. S., 465, 19 Sup. Ct. Rep. 265, 43 L. Ed. 517.

Brooks v. Missouri, 124 U. S. 394, 8 Sup. Ct. Rep. 443, 31 L. Ed. 454.

Union Nat. Bank v. Louisville, N. A. & C. R. Co., 163 U. S. 325, 16 Sup. Ct. Rep. 1039, 41 L. Ed. 177.

It is not enough to give the Supreme Court of the United States jurisdiction over the judgment of a State Court, for the record to show that a Federal question was argued or presented to that Court for decision. *It must appear that such Federal question was necessary to the determination of the cause and that it was actually decided, or that the judgment could not have been given without deciding it.*

Moore v. Mississippi, 21 Wall. 636, 22 L. Ed. 653.

Bolling v. Lersner, 91 U. S. 594, 23 L. Ed. 366.

Brown v. Atwell, 92 U. S. 327, 23 L. Ed. 511.

Louisiana *ex rel* Citizens' Bank v. Board of Liquidation (Citizens' Bank v. Board of Liquidation), 98 U. S., 140, 25 L. Ed. 114.

Endowment & Benev. Asso. v. Kansas, 120 U. S. 103, 7 Sup. Ct. Rep. 499, L. Ed. 30, 593.

Marrow *v's.* Brinkley, 129 U. S. 178, 9 Sup. Ct. Rep. 267, 32 L. Ed. 654.

Church v. Kelsey, 121 U. S. 282, 7 Sup. Ct. Rep. 897, 30 L. Ed. 960.

DeSaussure v. Gaillard, 127 U. S. 216, 8 Sup. Ct. Rep. 1053, 32 L. Ed. 125.

Blount v. Walker, 134 U. S. 607, 10 Sup. Ct. Rep. 606, 33 L. Ed. 1036.

Johnson v. Risk, 137 U. S. 300, 11 Sup. Ct. Rep. 111, 34 L. Ed. 683.

Cook County v. Calumet & C. Canal & Dock Co.,

138 U. S. 635, 11 Sup. Ct. Rep. 435, 34 L. Ed. 1110. Walter A. Wood Mowing & Reaping Mach. Co. *v.* Skinner, 139 U. S. 293, 11 Sup. Ct. Rep. 528, 35 L. Ed. 193.

Where one of the points decided in the Supreme Court of a State against the plaintiff in error would be a sufficient ground for the exercise of jurisdiction by the Supreme Court of the United States, yet if the decree is also based on another and distinct ground over which the National Court has no jurisdiction—as the statute of limitations of the State, the decree is beyond the revisory power of the Supreme Court of the United States.

Rector *v.* Ashley, 6 Wall 142, 18 L. Ed. 733.

The only possible ground upon which plaintiffs in error can build an argument that this case presents a Federal question authorizing the Supreme Court of the United States to review the judgment of the Supreme Court of Mississippi, is that in determining the rights of plaintiffs in error, the Mississippi Courts put a wrong construction upon the Special Act of Congress approved February 16, 1838, fixing the time and place for making judicial sales in Mississippi, in that the Mississippi Courts held that this sale was made at the wrong place. An examination of the opinion of the Supreme Court of Mississippi, which appears in the record, will disclose that holding that the Marshal's sale, set up as the foundation of the title of plaintiffs in error, was made at the wrong place, was but one of four equally fatal infirmities in plaintiffs' claim to title. The Mississippi Supreme Court held, first, That the alleged return on the writ of *fieri facias*, did not describe the lands in controversy, and therefore could not confer title even though regular and valid. Neither the special act of Congress invoked as pre-

senting the Federal question here, nor any other act of Congress, or constitutional provision, undertook to define what is and what is not a good and valid description of real estate, or to make any rule by which a purchaser at a Marshal's sale could take possession of lands other than those specifically described in the process. If a deed had been made pursuant to this return it would have been void for want of an intelligible and valid description of the realty sold. The question of a sufficient description was a question of general law. Second, The Court independently of the Special, or any other Act of Congress, held that under the Mississippi statute authorizing suits of the character then before the Court, that the plaintiffs in error had not deraigned a title to the lands in controversy, which under the Mississippi statute under which the suit was instituted, was a fatal objection to the bill. No possible Federal question was involved in that reason for dismissing the bill. Third, The Court held that the claim of plaintiffs in error was barred by the Mississippi statute of limitations, in that it failed to show possession by the plaintiffs, or their ancestor, during the sixty-four years that intervened between the Marshal's sale and the bringing of the suit, and did not, as required by the rules of practice in Courts of equity in Mississippi, show that it was the defendants, or those in privity with them who had fraudulently concealed from plaintiffs the evidence of their claim. It is quite true that the Supreme Court of Mississippi in the subsequent case of Kennedy v. Danders, 43 Southern Rep., p. 915, disapproved of its prior ruling in Jones v. Rogers, the case at bar, in so far as it held that a suit to cancel clouds upon title under Section 2730 of the Code of 1892, must be brought within ten years. But the Court held further that otherwise than its construction of Sec. 2730 of the Code of 1892, that its former ruling was correct. So this case was decided by the Supreme Court of

Mississippi, upon four independent propositions of law, either of which was fatal to the title and claim of plaintiffs in error, and but one of which furnishes the alleged Federal question here relied upon to sustain the jurisdiction of this Court to review that judgment. So far from the construction of this Act of Congress on the question of the place of sale being the *controlling* question upon which the judgment adverse to plaintiffs in error was rendered, it was simply one of three other equally fatal infirmities pointed out in that opinion. We therefore submit that this Court is without jurisdiction to review the judgment of the Supreme Court of Mississippi in this case.

BRIEF ON THE MERITS.

If the Court shall hold that the case sufficiently presents a Federal question authorizing an investigation into the merits then we insist that the judgment of the Supreme Court of Mississippi is correct.

The bill is ostensibly, and for the purpose of invoking equity jurisdiction under the Mississippi practice, a bill to cancel, or remove, clouds from the alleged title of Complainants in the Chancery Court of Harrison County, but in realty is a real or pretended effort to establish title to the lots of ground in the City of Gulfport, upon which the Court House and Jail of Harrison County have been erected, and to oust the County of possession.

The demurrer goes to the very ground of the action—not only do we insist that this bill shows no title, but that the whole claim lacks foundation upon which to rest, and that the whole superstructure is erected upon imaginary wrongs and must fall.

The whole case of plaintiffs in error as exhibited in this bill, rests upon the assumption that the alleged sale, by the United States Marshal in front of the State House, at Jack-

son, Mississippi, on October 28, 1839, vested in Complainant either the entire legal and equitable title, or such an equitable title as would enable Complainants to maintain a bill to divest the legal title out of the person now holding same and vest it in Complainants, and incidental thereto obtain such other relief as might be necessary to render a decree on the merits of this contention effective.

The first ground of demurrer, "That upon the facts alleged in the Bill and Exhibits, the said John Martin did not, by virtue of the alleged sale, acquire either the legal or equitable title to the land" brings up practically the whole case.

LEGAL CONSTRUCTION OF EXHIBITS TO BILLS.

Complainants' whole case rests upon the alleged certified copy of the execution in the case of Wanzer, Harrison *et al. v.* James McLaren, *et al.*, and upon the alleged return of the United States Marshal thereon, but complainants, with fervid imaginations, have alleged a number of things that are not at all borne out, or warranted by this alleged return. We insist that on this demurrer, the Court looks to the exhibit, and not to the Bill to determine the facts in relation to that alleged sale evidenced by the exhibit. On this point we call the Court's attention to the language used by the Supreme Court of Mississippi in the case of House *v.* Gumble, 78 M. 259:

> "By virtue of the statute Exhibit G became a part of the bill of complaint, and the averment referring to it could not qualify its nature and character. The Exhibit being a part of the bill, was before the Court for its opinion and judgment, and characterization of it by the pleader could not alter its essential nature. And where an Exhibit, made a part of the

Mississippi, upon four independent propositions of law, either of which was fatal to the title and claim of plaintiffs in error, and but one of which furnishes the alleged Federal question here relied upon to sustain the jurisdiction of this Court to review that judgment. So far from the construction of this Act of Congress on the question of the place of sale being the *controlling* question upon which the judgment adverse to plaintiffs in error was rendered, it was simply one of three other equally fatal infirmities pointed out in that opinion. We therefore submit that this Court is without jurisdiction to review the judgment of the Supreme Court of Mississippi in this case.

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bill by the statute, is contradicted by some averment of the bill, the fact will be taken in conformity with the Exhibit."

And in this case we insist that the question whether the alleged return, by the United States Marshal, is in fact such a return by such officer, or by some private person, and the legal construction to be given this alleged return are questions for the Court regardless of the allegations of this bill. The Court will observe that there is no allegation in this bill that any United States Marshal ever executed or delivered to Complainants' ancestor a deed conveying, or purporting to convey, this, or any other land, but simply that a sale was made by such Marshal on October 28, 1839, and that John Martin became the purchaser and that he, Martin, paid the bid. They allege no facts, such as the execution of a conveyance by the Marshal pursuant to a sale under an execution, sufficient to raise the presumption that in truth and in fact a levy and sale had been made pursuant to law, but on the contrary, stand upon this so-called Marshal's return to establish said facts, other than the allegation of the payment of the bid, and then invoke the rule that the Court will presume the execution and delivery of a deed from the facts established by this return as shown in the Exhibit to the bill. This so-called return is not signed by any person claiming, or assuming to act as a Marshal of the United States, not by any person styling himself as the Deputy, or properly authorized agent of such officer—it is signed simply Wm. M. Gwin, Marshal, per F. S. Hunt. Now who F. S. Hunt was, no where appears in this record. Whether he was a deputy Marshal, or one of those convenient personages who do what is commonly called the "heavy standing around," is wholly unexplained, and we insist that the signature by this "Hunt" of the name of the United States Marshal to this document is insufficient to elevate this so-called

return to the dignity of an official "certificate," or "attestation," so as to bring it within the purview of Section 1796 of the Code of Mississippi, 1892, which is as follows:

> SEC. 1796. "Any certificate, attestation, or authentication purporting to have been made or given by any person as an officer of any State or of the United States, shall be prima facie evidence of the official character of such person."

The certificate of the Clerk of the Court to the effect that said copy is a true and correct copy of the execution with the "endorsements and Marshal's return thereon," in no wise changes the situation. The question as to whether this endorsement on this writ, was a return by a Marshal of the United States, or not, is a question of fact, and one that no statute either Federal or State authorized the Clerk to certify to. He might, with propriety, have certified that it was a true copy of the execution with all endorsements on it, but the question as to whether an indorsement on such paper is a Marshal's return or not, is one that must be established by other evidence than a recital in the Clerk's certificate.

> "An official certificate is evidence only so far as the matter certified comes within the official duty or cognizance of the officer." Newman *v.* Harris, 4 Howard, Miss., p. 522.
>
> "The certificate of a Clerk of a Court is not evidence of the character or legal effect of a paper to which it is appended, as for instance, that it is a copy of a judgment roll, but only that it is a true copy of the original instrument on file in his office."
>
> Alexander *v.* Knox, 6 Sawyer 54 Cent. Dig. Vol. 20, Col. 1765.
>
> "The certificate of a public officer as to matters, or facts, which he is not by any enactment, or rule of

> law required or authorized to make, is extra official and entitled to no greater weight than the unsworn certificate of any other person."
>
> Encyclopedia of Evidence, Vol. 3, pp. 964 and 965, and authorities cited.

The case of Hughey *v.* Barrow, 4 La. Am. p. 248, announces what is undoubtedly the correct rule on this subject. In that case the Court says:

> "The certificate of a mere matter of fact by a public officer is not admissable. If he was bound to record the fact, a copy of the record duly authenticated is the proper evidence. As to matters which he is not bound to record his certificate is merely the statement of a private person and hence inadmissable."

Now, as we have heretofore stated, the allegation that this land was sold on October 28, 1839 by the United States Marshal, rests entirely as to its sufficiency as a statement of fact upon the recitals contained in the certified copy of this execution and the indorsements thereon; and the contents of this exhibit to establish this proposition is signature of the name of the Marshal by some person styling himself F. S. Hunt, and this certainly is not an attestation within the meaning of Section 1796 of the Annotated Code of Mississippi, *supra*, and the Clerk's certificate that it is a Marshal's return proves nothing more than that there is such an indorsement on the back of the original in his office. And Complainants' whole claim and assertion of title depending upon the sufficiency of this certified copy to establish a sale, for they say that this copy owned by them is the *"only one in existence,"* precludes the possibility of their establishing it by any other evidence, shows that no title can rest upon such a claim. In this case, as in an action of ejectment, Complainants (plaintiffs in error) must show title in them-

selves, either legal or equitable, and where they rest their case upon an Exhibit which is insufficient to establish a valid sale under execution, they must necessarily fail.

STATUTES FIXING THE TIME AND PLACE OF SALES UNDER EXECUTION ARE MANDATORY.

If we are mistaken in the position that this so-called return on this Exhibit is prima facie evidence of the performance of the acts therein referred to by a United States Marshal, then we insist that treating it as a return of such officer, and taking all the facts stated to be true, that these facts show a disregard of a plain statute, and render a sale as recited utterly void.

Statutes fixing the time and place of sales by Sheriffs under execution are mandatory and a sale made at a time or place other than that fixed by law is *void*. Koch *v.* Bridges, 45 M. 257; Loudermilk *v.* Copening 101 N. C. 649; Moody's Heirs *v.* Moeller (Tex.), 13 Am. State Rep. 839. It appears in the report of Moody's Heirs *v.* Moeller, that a sale was made by a United States Marshal, under an execution at law in the City of San Antonio, but instead of making the sale in front of the County Court House door, (the Texas statute being the same as that of Mississippi on this subject) the Marshal made it in front of the Federal building standing on the opposite side of the street from the County buildings. The Court held that the statute fixing the time and place of sales was mandatory, and that place meant in front of the County Court House door, not some other place in the same community or vicinity, and that the sale was not simply *voidable*, but *void*.

PLACE OF SALE BY UNITED STATES MARSHAL IN 1839.

By Section 3 of the Act of Congress approved May 19, 1828, it was provided:

> "That writs of execution and other final process, issued on judgments and decrees rendered in any of the Courts of the United States, and proceedings thereon shall be the same, except their style, in each State respectively, as are now used in Courts of such State; provided however, that it shall be in the power of the Courts, if they see fit in their discretion, by rules of Court, so as to alter final process in said Courts as to conform the same, to any change which may be adopted by the Legislature of the respective States for State Courts." Quoted from opinion in Beers v. Houghton, 9 Peters, p. 337. (L. Ed. Book 9, p. 149). This statute is the origin of Sec. 914 of present Rev. Stats. U. S.

By Section 4 of a Special Act of Congress approved February 16, 1838, it was provided:

> "That the Marshal of the several Districts of the State of Mississippi, in addition to the several sale days now allowed by law, may be authorized to sell property at the Court House in each county on Monday of each week, and on the first and second day of each term of the District Court; that he may at the written request of the defendant, change the sale of property to the place where the United States Court for the District is holden; provided, in the opinion of the Marshal the interest of the plaintiff is not compromised thereby."

The State Statute which governed in matters of this character, except in so far as modified by this Special Act of Congress provided that all sales of land should be made at the Court House of the County and on the First and Third Mondays of every month. Section 17 of Act of June 22, 1822, How. & Hutch. Dig. p. 633, which is as follows:

> SEC. 17. "No sheriff or other officer shall sell any property, by virtue of any execution, or other

process whatsoever, in a private or retired part of his county; but he shall sell the same at the Court House thereof, on the first Monday or third Monday of every month; which sale shall not commence sooner than eleven o'clock in the morning, nor be continued later than four o'clock of the same day; and the sheriff, or other officer, shall give, in the case of personal property, at least ten days' public notice; and in the case of lands and tenements, at least thirty days' public notice of such sales, by advertisement at the door of the Court House of his county, and at two other public places within the same, one of which shall be in the vicinage or neighborhood at which the property was taken, and also in one of the public gazettes, if there be one published in his county; and on such sale day, the sheriff or other officer shall proceed to sell, by auction, the goods and chattels, lands and tenements, to the highest bidder, or so much thereof, as shall be sufficient to satisfy the execution, and all costs accruing thereon.

It shall be lawful for the sheriff, or other officer, on the application of the defendant, in execution, where the same shall be levied on personal property, to call upon three respective, disinterested freeholders of his county, and if thy should unanimously certify, on oath, to be administered by the sheriff, or other officer, that the property so levied on will not command a reasonable price, in consequence of a defect of bidders, arising from inclement weather, or other cause, to adjourn the sale of such property, to the next regular sale day; and such sheriff, or other officer, shall give notice of such adjourned sale, in the manner hereinbefore required."

The Courts, both State and Federal, have in passing upon the validity of execution sales made by Federal Marshals uniformly held, that the Federal officer, in the execution of process of this kind must conform strictly to the State law. In Smith *v.* Cockrell, 6 Wallace, pp. 756 to 759 (L. Ed.

Book 18, p. 973), the Supreme Court of the United States held that the failure of a United States Marshal, in selling property under execution in the State of Kansas to comply with a statute of that State requiring an appraisal of property before sale, rendered the sale void, and conferred no title. See also Moody's Heirs *v.* Moeller, 72 Texas, p. 635, 13 Am. State Rep. 839. Borneman *v.* Norris, 47 Fed., p. 438.

Now, we respectfully insist that there is no special presumptions hedging around the acts, or supposed acts, of United States Marshals in executing process, even though such acts are hoary with age, and come to us from so respectable a source as the administration of Martin Van Buren. And if it appears from the alleged return on this ancient document that the Marshal disregarded a plain provision of law, then his acts were void and incapable of transmitting title. It is manifest that this Marshal had no legal power or authority to make a sale under execution of this land, then situated in Hancock County, in Jackson, except upon the *written request* of the defendant, James McLaren. And if the United States Marshal held such request, the only place in Jackson where he was authorized to make such sale, was in front of the building or *place* where the United States Court was held at the time. Now if the Court will inspect this Exhibit, it plainly appears that this Marshal made two different sales of land under it. The first sale was made on the 7th day of October, 1839, in front of the State House in Jackson, of several tracts or bodies of land in various counties, and this first sale as appears by the express language of the so-called return, was made at Jackson on a *written request* of the defendants in execution. The alleged sale of the lands in controversy, as appears by this so-called return was made three weeks later, or on the 28th of October, 1839, in front of the State House in Jackson, but not one word is said about it having taken place

there because of any written request, or other request, of defendant in execution. The law having fixed the place of such sales at the County Court Houses, and the Marshal being required to make such sales there, except where a defendant should make a *written request* otherwise, we insist that the existence of such written request was absolutely mandatory, and that the Court can not presume in a case like this where all of the acts of the officer are set out, and where it is silent on this point, that such request existed. We undertake to say that in a case of this kind where no deed was ever executed and where the sole evidence of such sale is the so-called return, that the return itself of the existence of such a vital and jurisdictional fact, is not sufficient—that writing itself must appear. Why did Congress require a request in *writing* if the assent of the defendant was to be established by inferences. The *written consent* itself, in the absence of a deed, we undertake to say is required, and that a so-called return setting out minutely what was done and being silent on this vital subject, can only raise the presumption that no such request existed, if indeed presumption can be indulged at all.

But aside from the question as to whether there was a written request in this case, so as to authorize a sale in Jackson, it nowhere appears, by any allegation of the bill, or otherwise, at what place in Jackson the sale of the lands claimed occurred. The word "place" in this Special Act of Congress, authorizing sales at the place where the United States Courts are held, had reference to the *building* in which it was held. The object of the rule requiring a strict compliance with statutes fixing the time and place of judicial sales would altogether be defeated by holding that *place* within that statute meant any where in the municipality, or vicinity, of the Court. As held in Moody's Heirs *v.* Moeller, *supra*, it means the *building* in which the Court is held and that a sale in the same town, or city, is not a compliance

with the law. This sale occurred, as appears by this return, simply in Jackson and there is no allegation in the bill, nor does it appear by the return that it occurred in front of the building occupied by the Federal Court at the time. So we respectfully submit that this so-called return does not show that this alleged sale under which complainants claim, was made at a time, or *place*, authorized by law and was therefore void. It is insisted however, that the Court will, after the half century and more than has intervened since this sale, presume that a deed was actually made, and that the presumed execution of this presumed deed, will raise the presumption that all things pre-requisite to authority to make the sale in Jackson in front of the State House existed. Presumptive evidence is, at best, a mere inference from certain things conclusively shown to exist, that in the ordinary course of events another fact must necessarily exist. And it is seldom indeed that the Courts in the trial of so important a matter as the title and right of property in valuable real estate will rely upon presumptive evidence, but we do insist that if Courts ever accept presumptions to supply facts, which should appear, that they will never permit the propping up of one presumption upon another—in other words the Court will not presume that a deed was actually executed by the Marshal to John Martin based upon this so-called return and then presume that because of the presumed existence, at one time, of such a deed, that all conditions existed authorizing its presumed execution. On this line it is argued that because it is alleged in this bill that "the said defendant in execution and also the patentee" yielded up possession of said lands after said sale of said land on October 28, 1839, that the Court will presume under the rule announced in Nermant *v.* Eureka Company, 98 Alabama 181, 39 Am. State Rep., p. 45, that a deed was in fact executed by the Marshal. The rule announced in this Alabama case is cor-

rect, but in order to invoke that rule the purchaser must show that he not only *took possession under the sale, but that he has remained in possession since.* It is a presumption arising from the fact of a *continuous uninterrupted actual possession,* and not from a recital in a return that a named person was the successful bidder. We invite the Courts' attention to the careful and guarded language in this bill above quoted. It no where alleges that McLaren, the defendant and patentee, yielded possession of this land to Martin, complainant's ancestor. But that he "yielded up possession." To whom did he yield up possession? Every allegation of a pleader is construed most strongly against him, and if it were meant to allege that John Martin was ever in possession of this land, it was easy enough to say so, and just as easy to say *when and by whom he was ousted.* In this connection we desire to call the Court's attention to a legal presumption that arises on the face of this bill that applies directly to the case. The complainants having failed to allege the execution of any deed or conveyance by this Marshal, but stands upon a so-called return of an officer, and an allegation that the defendant and patentee "yielded up possession" without saying to whom, and sixty-four years afterwards without any sort of history of the matter being given, it appears that the defendants are in possession. It has been expressly held by the High Court of Errors and Appeals in Cooper *v.* Granberry, 33 Miss. 117, that a return on a writ of execution reciting a purchase by a person named, does not operate to transfer the title, but simply confers a right, if payment is made, to compel either the sheriff, or defendant in execution, as the case may be, to execute a deed conveying the title. In this case the Court uses the following language:

> "It is again said that the return on the execution under which G. E. Cooper purchased the land, when

> it was sold as the property of the defendant, shows that one Walker bid off the land. *The return does not transfer the title* (italics ours). It is at most only evidence that Walker was entitled to demand a deed from the sheriff, and he could, if disposed to, assert his right, force the sheriff (or Cooper, holding the deed from the sheriff) to convey to him, Walker. But in the absence of a showing that his bid was consummated by a deed, it will be presumed after this lapse of time, that he transferred his bid or did some act renouncing it."

The lapse of time in that case, as appears by the report, was fifteen years. Applying this rule to the case at bar and what presumption arises? Here no deed was ever executed by the Marshal, and no act of possession alleged by the purchaser, his heirs, or vendees, and sixty-four years afterwards the lands are in the occupancy of defendants. The only presumption that can arise, or that is entitled to a moment's consideration is that John Martin either renounced and abandoned his bid or transferred it, if indeed it had any force, to those in privity with the present occupants. So we insist that every fact alleged in this bill, as construed in this light of the contents of the Exhibits, show that this pretended Marshal's sale was void and incapable of conferring title; and that every presumption of law arising from the facts alleged irresistably leads to the conclusion that this whole claim of title, founded upon this so-called return is a myth and creation of the speculative values ruling around Gulfport.

PROPER PARTIES NOT BEFORE.

This so-called return not being sufficient in itself to convey the legal title, and this is necessarily a proceeding regardless of its baptismal certificate by counsel for complain-

ants, as a bill to remove clouds from title, to establish an equitable title and to draw to that title the legal title and possession, by divesting the legal title out of McLaren, or his heirs and vesting it in complainants. In such a case the holder of the legal title, or his heirs, are absolutely indispensable parties. Adams *v.* Harris, 47 Miss., 144; Mitchell *v.* Shell 49 Miss. 118; Clayton *v.* Merritt, 52 Miss. 353; Kimbrough *v.* Curtis, 50 Miss. 117. But we are answered on this proposition that the bill shows that McLaren had no heirs—that he died without ever having been married, leaving no heirs, etc., but this bill nowhere alleges that McLaren died intestate, which is absolutely essential in such cases. Even if it were true that a man died without heirs fifty years ago, and people were found in posssion of property formerly belonging to him, the Court in the absence of an allegation to the contrary must assume that he left a will and that the present occupants claim under it. But suppose we view this case in the light of an allegation that he, McLaren, did die intestate, leaving no heirs, at some date since 1839. If this is true the title vested immediately in the State of Mississippi. There never has been a day since 1839, when a man dying without heirs capable of inheriting his lands, but that there was a law vesting the title in the State, and the State of Mississippi, as the holder of the legal title, should have been made a party defendant. An objection for want of proper parties can properly be raised by demurrer. Rodd *v.* Durbridge, 53 Miss. 694.

THE FACTS ALLEGED IN THE BILL DO NOT WARRANT THE CONCLUSION THAT COMPLAINANTS ARE HEIRS OF JOHN MARTIN OR HAVE ANY INTEREST IN THE LAND SUED FOR.

The allegations of this bill that complainants are heirs of John Martin, and inherited his alleged interest in this land is simply a legal conclusion of the pleader and no facts are

alleged supporting such conclusion. In the first place there is no allegation that John Martin died intestate, so that his heirs at law could succeed to his interest in lands, and which allegation we insist is absolutely essential. In the next place complainants do not give nor pretend to give any history or detailed statement of their several relationships to John Martin, deceased, but simply aver that they are his "heirs" and own certain interests in the land. We submit that the question as to whether one person is the "heir" of another, is a question of fact, and depends upon his, or her, relationship to the deceased, and that the facts constituting such relationship should be stated. If complainants are the children, or grandchildren, of John Martin, and John Martin died intestate, the Court would then know if they are heirs and succeed to his interest. But no Court is required to accept from a person his legal conclusions, based upon undisclosed facts, that he is the heir of a deceased person. Let them state their relationship to the deceased and the Court will decide upon the facts whether they are legal heirs. The bill in this respect does not contain a deraignment of the complainants' claim as required by the statute.

Long *v.* Stanley, 79 Miss., p. 299.

THE EXECUTION IN THIS CASE ISSUED UPON AN APPARENTLY SATISFIED JUDGMENT.

The plaintiffs in error do not allege in their bill that the executions under which the land was sold were issued upon valid judgments of the Federal Court, nor that any judgment was ever rendered against the defendants in execution, but as the bill makes an obscure reference to "said judgment" and a certified copy of a judgment is exhibited as a part of the bill as will treat the bill as alleging that the execution issued on that judgment.

The judgment exhibited with the bill is the final judgment rendered by the Court in one of the causes mentioned in the Marshal's return, Wanzer & Harrison *v.* McLaren & Hammond, and the execution under which it is claimed the land was sold purports to have been issued not on that judgment but on a forfeited forthcoming bond, the existence of which is not alleged. Under the State law in force at that time and by which procedure in the Federal Courts was regulated, after forfeiture of a forthcoming bond execution was not issuable on the judgment of the Court but on the bond. Hutchinson's Code, p. 910. Furthermore, it is well established that the acceptance by the officer of a forthcoming bond under the statute cited operated as satisfaction of the judgment of the Court and extinguished its lien.

Connell *v.* Lewis, Walker (Miss.) 251.
Stewart *v.* Fuqua, *Ib.* 175.
Sampson *v.* Breed, *Ib.* 267.
Davies *v.* Dixon, 1 How. (Miss.) 64.
Weathersby *v.* Proby, *Ib.* 98.
Bank *v.* Patton, 5 *Ib.* 200.
Chilton *v.* Cox, 7 S. & M. 791.
McComb *v.* Ellett, 8 S. & M. 505.
Robinson *v.* Painter, *Ib.* 613.
Pritchard *v.* Myers, 11 S. & M. 169.

The original judgment being merged in the Statutory judgment on the bond, an execution issued on it is void.

Bell *v.* Tombigbee R. R. Co., 4 S. & M. 549.
Moody *v.* Harper, 28 Miss. 615.
Witherspoon *v.* Spring, 3 How. (Miss.) 60.
King *v.* Terry, 6 *Ib.* 513.
Brown *v.* Clarke, 4 How. (U. S.) 12, 13.

It is thus seen that the complainants who do not allege that any forthcoming bond was ever given, rely on

a judgment that was satisfied if it was given and on an execution which was void if issued on the judgment they set up as authorizing it.

The judgment relied on was satisfied before the issuance of the execution, if a forthcoming bond was given, and an execution issued on a satisfied judgment is void, especially where it discloses to the purchaser under it the fact of the satisfaction of the judgment. If no forthcoming bond was given the execution in question was void for it purports to be founded on a statutory judgment which could not exist without the necessary precedent conditions of the existence and forfeiture of a forthcoming bond, and is against a new party, the surety on the alleged forthcoming bond who was a stranger to the original judgment.

The bill is clearly obnoxious to demurrer for the reason that it does not allege that a forthcoming bond was given and forfeited, for the sale relied on was under an execution which was not authorized by law except after upon the forfeiture of a forthcoming bond, and the showing made of the original judgment in no wise helped the case. It will not do to say that the Court will indulge a presumption in favor of the discharge of official duty and hold that there must have been such a forfeited bond because the clerk would not otherwise have issued the writ. Such reasoning would equally apply to the case of a sale under an execution issued on the original judgment, or any final judgment, and nothing is better settled than that this presumption cuts no figure in such cases and the existence of the judgment must be alleged and proved to sustain the sale. The long established rule in respect to sales under execution is stated as follows:

> "One predicating title to property on an execution sale must show that there was a valid subsisting judgment under which the sale was made pursuant to a valid execution."
>
> 25 Am. & Eng. Enc., L. 2d Ed., 821.

This principle so pervades the judicial system of our own State as to make the citation of decisions superflous.

The execution exhibited with the bill was issued in the case of Wanzer & Harrison v. McLauren & Hammond, and by endorsement of the clerk is credited with the sum of $1,239.24. The return on this execution says that it was levied together with six others against the same defendants, on the lands in controversy and other lands. The other lands were sold on October 7, 1839, and realized the sum of $11,875, while the lands in controversy were sold on October 28, 1839, and realized the sum of $760. The judgment on which the execution in question issued was for the sum of $4,121.86, and the execution had been already credited by the sum of $1,239.24, leaving a balance due of say $2,900.

This judgment for $2,900 is the only one of which we have any information for the reference to other executions in this return does not show that any other existed, much less that they were issued upon valid judgments. It thus appears that to satisfy the only judgment debt of which we are informed, the one for $2,900, the officer made two sales, and sold the lands in controversy at the second sale, after realizing $11,875 on the first sale. If we concede that where lands are the subject of a single sale under several executions the validity of any one of the executions will sustain the sale, the proposition in no wise relieves the difficulties presented by the case in hand. Here three or four times enough of money had been realized to pay the only judgment of which we have knowledge before the lands in controversy were dealt with at the second sale. The bill does not allege that any other executions existed, nor that they were supported by valid judgments; and even if the judgments existed they might well have been, along with that exhibited with the bill, fully satisfied by the proceeds of the first sale. The others were doubtless for sums not less than

the jurisdictional amount of $500, but they may have just slightly exceeded that sum, in which case the $11,875 would have satisfied all seven of the judgments, especially if the others like this one was subject to credits, which is more than likely. The first sale was certainly under this execution whether under others also or not, and although such a large amount of money was realized there is nothing to show that any part of it was either appropriable or in fact appropriated to any other judgment against the defendant. Moreover, the Wanzer & Harrison execution, the only one we really know anything about, may have been entitled to priority and been fully satisfied by the first sale.

These reflections at least show that the bill is defective in failing to aver anything in respect to the other judgments and executions.

THE CLAIM OF PLAINTIFFS IN ERROR A STALE ONE.

The bill alleges that divers persons set about to cheat and defraud the complainants and combined to get possession of said lands and concealed the facts *until recent years*. The true interpretation of this language is that at a period which can not be denominated recent, the assault upon the rights of complainants as the heirs of John Martin had been begun by acts manifesting the evil intentions imputed to the divers persons mentioned to possess and sell and convey the land. In other words, the alleged conspiracy would not have been in process of culmination from 1848, the year of Martin's death, to 1902, but must many years anterior to the latter date have resulted in conveyance of the property and adverse possession under the same. It would be but a poor and halting conspiracy to get possession that would drag along without accomplishing its ends for fifty-six years.

The bill, it will be noted, alleges that at some undisclosed date after the sale McLaren, defendant in execution, yielded possession, but it is not alleged that he yielded it to complainants' ancestor, Martin, nor is it alleged that either Martin or any one claiming under him ever had actual possession, nor is there any allegation as to how he or they lost possession to help out the lack of an averment that he or they at one time had possession unless it be held to allege that at a time not recent the divers evil minded persons accomplished their purpose and secured possession. It is alleged that when Martin died, which was during the remote year of 1848, he was seized and possessed of the land in fee simple, but under the rules of pleading this allegation must be taken to mean only that constructive possession which the law impotes to the holder of the legal title, and which is referable to wild land as well as that susceptible of actual possession. Especially would this interpretation be given to such an averment in a bill containing so much to negative the idea that actual possession was ever held. If the property has been held adversely either since the date of the sale under execution or from a remote period following the death of Martin in 1848, a cause of action existed and the following statute of limitation is applicable:

> Code 1892, Sec. 2763. "Bills for relief, in case of the existence of a trust not cognizable by the courts of common law and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue and not after; saving, however, to all persons under disability of infancy or unsoundness of mind, the like period of time after such disability shall be removed; but the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years."

If ever a proper case existed for the application of the doctrine of *laches*, this is the case.

In the later decisions of this Court where the doctrine of *laches* has been considered the party against whom it was invoked will always be found, we think, to have been the holder of the legal title. Under the law in force when the sale in question was made the execution of a deed by the officer was essential to the vestiture of title in the purchaser.

Hutchinson's Code, p. 907.

These plaintiffs in error do not show by their bill that they have the legal title, but assert a supposed equity, and the consideration of the cause involves, therefore, a comparison of the equities of the parties, complainant and defendant.

In no decision of the Supreme Court of Mississippi, that we are aware of, has the defense of *laches* been declared to be no longer available. The Supreme Court of Mississippi has held that it may not be invoked disconnected from the equitable doctrine of estoppel, and that no shorter time will be considered than that prescribed by the statute of limitations. It has never held and we think never will hold, that both the lapse of time prescribed by the statute and the conditions prescribed by it as adverse possession, etc., must exist, for in such case there could never be any occasion to invoke the doctrine, and it would be practically extinguished. That would not consist with the declaration that it is still available in connection with estoppel. The doctrine of *laches* is of equitable origin and antedates all statutes of limitations which were but a specific application of the doctrine in certain states of case made applicable to the courts of common law. No statute of limitations can be said to contemplte the abolition of the doctrine in the absence of words of gegation. On the contrary the wisdom and utility of the doctrine find recognition in such statutes. Equity follows the law and applies statutes of limitation which at first were

confined to actions at law, but it does not result from this that it has been divested of authority to apply its ancient maxim that aid will be given to the diligent and not the slothful, which as has been well said, is but a special form for the more general principle that "he who seeks equity must do equity."

11 Am. & Eng. Enc. L. (2d Ed.) pp. 165-176.

The most zealous partisan can hardly claim that the right acquired by Martin in October, 1839, has been asserted with diligence. From that date to the filing of the bill was just sixty-four years. The snail has made for himself a record, but for real slowness he is out-classed by the claimants under this execution sale, whose movements must be timed with the journey of the glaciers or the alterations in the axis of the earth. While they have waited, babies have grown to partriarchal age, and gathered around them their children, and their children's offspring; population has changed its ancient seats and the face of mother earth altered almost beyond recognition; great wars have been fought and states and kingdoms passed away; the transcontinental railways, the Suez and Panama canals, the harnessing of Niagara, the telephone, the phonograph, the flying-machine, and wireless telegraphy have all come in this interval. Society and its laws and institutions have been changed, and we now have land that is neither state nor territory, and benevolent assimilation *vi et armis*, prohibition, hypnotism and a world power, the new woman, trusts and combines and Pierpont Morgan and John D. Rockefeller, twin kings of the financial world.

Among all the other vicisitudes of time we ask the Court to note especially the change in the character and value of the property in controversy. The return on the execution shows that the whole of the land sold brought only $760,

and the deed from the defendant J. T. Jones to Harrison County, exhibited with this bill locates the land at Gulfport, where the Court House is fixed by law. Since the sale, in 1839, Gulfport, which then had no existence, has become the terminus of the main line of an important railway system, and is a most flourishing town and a noted seaport. Upon the harbor and railway which give value to its real estate, the defendant, Captain Jones, has spent millions of dollars, handsome buildings have been erected at great cost, manufacturing established and the high value of property in the locality become a matter of common knowledge. We do not doubt that the land sold at the second sale instead of $760 is now worth $760,000.

Although the bill is silent on the subject the Court can well imagine how often during the long period of sixty-four years the large tract of land included in the second sale has been the subject of conveyances, how greatly it has been subdivided and utilized by various individual owners, the rights of all of whom depend upon the result of the present suit; and all of whom have discharged yearly recurring tax liens, thus preventing forfeiture to the estate.

Even in cases where parties hold the legal title, their failure to assert the same while other claimants are making expenditures on the property to their knowledge and where the property has greatly enhanced in value during the period of their inactivity, is held to estop them from asserting such title. We insist that this estoppel justifies the application of the doctrine of *laches*.

Foster *v.* Mansfield Etc. R. Co., 146 U. S. 88.
Harwood *v.* Railroad Co., 17 Wall. 78.
Johnston *v.* Standard Co., 148 U. S. 37 O.
Lansdale *v.* Smith, 106 U. S. 391.
Norris *v.* Haggin, 136 U. S. 386.
Twin Lick Oil Co. *v.* Marburg, 91 U. S. 587.
18 Am. & Eng. L. (2d Ed.) 102.

Unreasonable delay in the absence of fraud is treated as a bar to equitable relief whether with or without excuse, and even in cases of fraud where there has been great lapse of time and the rights of third persons have intervened it has the same operation.

DeMartin *v.* Phelan, 18 Fed. Rep. 865.
Randolph *v.* Quidwick Co., 135 U. S. 457.
Southern Etc. Extension Co. *v.* St. Paul Etc. R. R. Co., 55 Fed. Rep. 690.
St. Paul Etc. R. R. Co. *v.* Sage, 49 Fed. Rep. 315.
DeWitte *v.* Chicago Etc. R. Co., 41 Fed. Rep. 484.
Hayt *v.* Sprague, 103 U. S. 613.
Underwood *v.* Moulter, 138 U. S. 380.
Whitney *v.* Fox, 166 U. S. 637.
Horsford *v.* Cudger, 35 Fed. Rep. 388.
James *v.* Atlantic Etc. Co., 3 Cliff. (U. S.) 614.
Royal Bank *v.* Railroad Co., 125 Mass. 490.

The Court will observe that the return as set out in the transcript on file mentions the land sold at the second sale as being certain government subdivisions "in the vicinity of Mississippi." This description may be erroneously copied into the record of this case, but we do not know whether it is or not, and will stand on the record as certified until such error shall have been made to appear, in which case this subdivision of our argument may be treated as withdrawn.

According to this recital the land described in the return is not in the State of Mississippi, for to be in the vicinity of any designated area is to be outside of it, although close to it, and proximity and remoteness are alike in such case, since both denote land outside of such area. If the governmental subdivisions had alone been given an argument might be made for the sufficiency of the description as meaning land of that description within the district of the Marshal, but that will not do where the return shows in terms that the land is not in, but in the *vicinity of Mississippi.*

The description is void, and was so expressly held by the Supreme Court of Mississippi. It is therefore respectfully submitted that the judgment of the Supreme Court of Mississippi was correct and should be affirmed.

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